

OPINIONS
OF THE
CORPORATION COUNSEL
AND ASSISTANTS

FROM
APRIL 5, 1897, TO APRIL 10, 1905

PUBLISHED BY DIRECTION OF THE
CITY COUNCIL
OF THE CITY OF CHICAGO

COMPILED AND EDITED BY
EDGAR BRONSON TOLMAN
CORPORATION COUNSEL



PREFACE

The first volume of "Opinions of the Corporation Counsel and Assistants" was published in book form in the year 1897, under the supervision of Mr. Wm. G. Beale, then Corporation Counsel. The use of this volume in the various departments of the city government has demonstrated its great practical value.

Soon after my appointment as Corporation Counsel in 1903, Mayor Harrison requested me to compile and publish the opinions of the Corporation Counsel rendered since 1897, so as to bring the publication down to date. Appropriations were made for that purpose by the City Council in the annual appropriation bills of the years 1904 and 1905. The work involved in selecting from nearly ten thousand opinions those which seemed likely to be of the most importance, and the personal labor of reviewing and editing the compilation, has been so great that the last manuscript was not handed over to the printer until nearly the end of my term of office.

The opinions rendered during the four years' incumbency of my predecessor, the Hon. Charles M. Walker (now Judge of the Circuit Court) have been by him reviewed and edited.

The preliminary work of selection and the important task of preparing the index has been done by Miss Estelle V. Pease, a member of the bar, whose faithful and efficient work in the City Law Department is here given public recognition.

Each opinion has also been carefully revised and examined by my first assistant, Mr. William H. Sexton, whose long and honorable service in the Law Department has peculiarly fitted him for such work.

The imperfections of this work may be charged, in part at least, to the fact that during my whole term of office every daylight hour was engrossed with the current work of the department, to which was added the labor involved in the "traction" litigation, the compilation of the "Revised Municipal Code", and the drafting of "Charter Legislation". I hope that, notwithstanding its defects, this compilation of opinions may prove to be as useful and helpful as the volume which preceded it.

Chicago, April 10, 1905.

EDGAR BRONSON TOLMAN,
Corporation Counsel.



CHICAGO NEWSPAPER UNION
CHICAGO

OPINIONS

OF THE

CORPORATION COUNSEL AND ASSISTANTS

FROM

APRIL, 1897, TO APRIL, 1905.

APRIL 6, 1897.

HON. GEORGE B. SWIFT, Mayor.

Dear Sir:

Referring to your inquiry respecting your legal right to appoint Mr. John O'Neill, lately resigned as Alderman from the Thirty-fourth Ward, to the position referred to in the council order of March 29th (Current Council Proceedings, page 1932), I beg leave to say that in my judgment Mr. O'Neill cannot be lawfully appointed.

Section 5 of Article 3 of the general incorporation law provides that no Alderman shall "be eligible to any office, the salary of which is payable out of the city treasury, if at the time of his appointment he shall be a member of the City Council; nor shall any member of the City Council at the same time hold any other office under the city government." The only question in my mind arises from the use of the word "office" in this provision, but having in view the purpose of the law I think the position of "track elevation expert," as established, is clearly to be regarded as an "office" within the meaning of the provision. If this be so there can be no question about the matter, for clearly Mr. O'Neill is still a member of the City Council, notwithstanding his resignation and its acceptance. A decision of the Supreme Court of this State covers the case with unusual completeness.

Aldermen hold their office for the term of two years, and until their successors are elected and *qualified*; so also do

town supervisors. In the case of *People v. Barnett Township*, 100 Ill., 332, a town supervisor had resigned, in order to avoid executing some township bonds. His resignation was accepted, and at an election shortly afterwards his successor *was elected*, but the successor *did not qualify*. The court held that the expiration of an official term through a resignation, and its acceptance, did not differ from an expiration through lapse of time; that in either case the officer would continue to hold until the qualification of his successor, where the law so provided; and that the supervisor who had resigned, and whose resignation had been accepted, and whose successor had been elected, was still in office and liable to a writ of mandamus compelling him to execute the bonds. This fully covers the case of Alderman O'Neill. His resignation and its acceptance amount to nothing, because he must technically continue to be an alderman until his successor, elected at the coming regular election, shall qualify; and upon the election and qualification of his successor Alderman O'Neill would have ceased to be a member of the City Council without the resignation and its acceptance.

Very respectfully yours,

WM. G. BEALE,
Corporation Counsel.

APRIL 7, 1897.

MR. N. T. BRENNER, Chairman of the Sub-Committee of the Judiciary Committee of the City Council.

Dear Sir:

Your request for an opinion from this department as to the legality of the enclosed ordinance, concerning the regulation of bill-boards, has been referred to me for an answer.

I find upon investigation that there is no specific clause in the city charter empowering the City Council to pass an ordinance regulating the construction and disposition of bill-boards, sign-boards, and such structures upon private property, and, as a matter of course, if such structures were built upon private property in such manner as not to be unsafe from the point of protection from fire or wind, I believe nothing could be done by the City Council prohibiting an owner

of property from building and maintaining sign-boards or similar structures upon his own land. Such being the case, if the enclosed ordinance is to be considered legal at all, it must be as a police ordinance; that is to say, an ordinance concerning the safety and preservation of life and property, and as such I think this ordinance can be upheld. Large wooden bill-boards or similar structures built in a densely populated city without restriction as to size or proximity to other like structure would render a conflagration very probable and would greatly endanger the safety of surrounding property. I, therefore, believe that the City Council by reason of the power vested in it by clause 66 of article 5, entitled "powers of the City Council", can legally pass and enforce the ordinance here in question, and I therefore return the same to you believing it to be a valid and enforceable ordinance.

Yours very truly,

WM. H. ARTHUR,

Assistant Corporation Counsel.

APRIL 19, 1897.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In response to your inquiry as to the meaning of the words "heads of any principal department of the city"¹ contained in Section 11 of the Civil Service Act, I beg leave to report that I concur in the opinion of my able and learned predecessor in this office to the extent that he declares that "a principal department is one which in the main is subordinate only to the City Council and to the Mayor"; that "subordinate divisions of the municipal service, though they may be spoken of as departments, can hardly be regarded as principal departments within the meaning of the law." I agree with him also in his designation of such subordinate

¹Note: Although the principal contention of this opinion was overruled by the Supreme Court of Illinois in the case of *People ex rel. v. Kipley*, 171 Ill. 44, it has been included in this compilation of opinions on account of its historical significance. See opinions on pp. 249 and 813.

divisions as bureaus, sub-departments or divisions, and that two of these divisions of the Department of Public Works are the Street Department and the Water Department, and that their heads are under the supervision and control of the Commissioner of Public Works. I disagree, however, with the former Corporation Counsel in his opinion that the heads of the street, water and other divisions of the Public Works Department, and that the heads of the branches of the several principal departments of the City are not exempt from classification in the classified Civil Service. A careful reading of Section 11 will show beyond question that the heads of the several divisions or bureaus are exempt from classification in the classified Civil Service. That section reads as follows:

"OFFICERS EXCEPTED FROM CLASSIFIED SERVICE. Officers who are elected by the people, or who are elected by the City Council pursuant to the city charter, or whose appointment is subject to confirmation by the City Council, judges and clerks of election, members of any Board of Education, the superintendent and teachers of schools, heads of any principal department of the city, members of the law department, and one private secretary to the Mayor, shall not be included in such classified service."

It will be noted that the term "any principal department of the city" is singular, and not plural in number. It will also be observed that the word "heads" is plural. Who constitute the heads of a principal department, for instance, the Department of Public Works? Not the Commissioner alone. He might have possibly been described in this act, had the legislature desired, as the head of a department, but in his single capacity no one will for a moment think that he is the only one meant when the act refers not to the head of his department, but to the heads of that department. Who are the heads? There can be no other interpretation than that the term includes the Superintendent of the Water Department, the Superintendent of the Street Department, and the superintendents of each separate division or bureau within that principal department named. It may also be said that any other interpretation than this would render meaning-

less and unnecessary the words "heads of any principal department of the city" contained in said Section 11, because each one of the heads of the principal departments of the city immediately subordinate to the Mayor is referred to and included in the preceding clause, to-wit: "officers whose appointment is subject to confirmation by the City Council."

The ordinances of the City of Chicago seem to regard the distinction already referred to. Attention is called to Section 1598, which says:

"There is hereby established an executive department of the municipal government of the City of Chicago which shall be known as the Department of Public Works, and shall embrace the Commissioner of Public Works, the Deputy Commissioner, and Secretary to said Commissioner, the City Engineer, the Superintendent of Streets, the Superintendent of Street and Alley Cleaning, the Superintendent of Water, the Superintendent of Sewerage, the Superintendent of Special Assessments, and the Superintendent of ^{M. L. S.}

Ordinances relating to other departments have been enacted also designating the heads of the several bureaus embraced in each of said departments.

Further than this it may be said also that the Civil Service law was not intended to prevent the electors of the city when they desire a change of administration from making such change practically inoperative and impossible by prohibiting the incoming administration from immediately placing its officers in positions where they may at once inspect all of the work being and about to be performed by such administration. A change merely of Mayors and of a few officers in a force numbering from ten to fifteen thousand men would be of little value in an effort to bring about a change in the system of administration. It is intended by the Civil Service law that not only the superior officers who never come in contact with the mass of the city employes must be changed with a change of administration, but the head of every department and sub-department that comes in actual contact with the men who perform the work for the municipality. The six superior officers of the city would never be able to make a change in the system of administration within

the short term of their official existence, for it would be out of the question for them to interview and give directions individually to so many employes. A restricted interpretation of the words in Section 11, "heads of any principal department of the city," and the limitation thereby to six officers would practically deprive the people of the benefits of a change of administration. Such a construction of the law would be disadvantageous to its most earnest friends. The law was not meant to hamper an administration in its efforts to correct abuses in the service, but was made for the purpose of obtaining for the people an efficient public service, and one in which reforms, when necessary, could speedily be made.

The officers who in my opinion are not comprised in the classification of the Civil Service Commission by reason of that portion of said Section 11, but are exempt therefrom, are, among others, as follows:

DEPARTMENT OF PUBLIC WORKS

See Section 1598 of Code.

Deputy Commissioner,
 Secretary to Commissioner,
 City Engineer,
 Superintendent of Streets,
 Superintendent of Water,
 Superintendent of Sewerage,
 Superintendent of Special Assessments,
 Superintendent of Maps,
 Superintendent of Street and Alley Cleaning,
 Chief of the Department of Street Engineers,
 Chief of Sidewalk Office and Inspector's force.

DEPARTMENT OF BUILDINGS

Section 218 of Code.

Commissioner of Buildings,
 Deputy Commissioner of Buildings,
 Secretary to the Commissioner.

FIRE DEPARTMENT

Section 601 of Code.

First Assistant Fire Marshal,
Superintendent of City Telegraph,
A Secretary of the Fire Department,
One Fire Inspector,
One Veterinary Surgeon.

HEALTH DEPARTMENT

Section 803 of Code.

Assistant Commissioner of Health,
City Physician,
Chief of the Bureau of Smoke Inspection,
Chief of the Division of Sanitary Inspection,
Superintendent of the Municipal Laboratory,
Chief of the Bureau of Vital Statistics,
Chief of the Division of Contagious Diseases,
Superintendent of Isolation Hospital.

POLICE DEPARTMENT

Section 1477 of Code.

Assistant Superintendent of Police,
Secretary of Department of Police,
Inspectors (4),
Captains (15).

Very truly yours,
CHAS. S. THORNTON,
Corporation Counsel.

APRIL 23, 1897.

MR. JOS. S. MARTIN, City Collector.

Dear Sir:

With reference to the inquiry contained in your letter of the 21st inst., as to whether the chief officials of the Department of the City Collector come within the classified service regulated by the Civil Service law, I beg leave to re-

port, that I consider all of the officials employed in that office within said classified service. You have the opportunity, however, under Section 12, to remove any of said officials having the custody of public money without permission of the Civil Service Commission; that class of persons being expressly excluded from the operation of said law by virtue of Section 12 of the Civil Service act. You have no power, however, to fill the vacancies thus created except as you bring yourself within the operation of said law. There seems to be a serious omission in the law in that regard. You have the opportunity to discharge employes who are either dishonest or unsatisfactory to you, but you are not given an opportunity to fill such vacancies with men who are either known to you or personally known to the members of the Civil Service Commission. You are obliged to receive from the Commissioners, as your assistants, men, each one of whom collects on behalf of the city sums varying from \$5,000 to \$50,000 per month. The honesty, fidelity and trustworthiness of those furnished you by the Commission will have been tested in no manner by the Commission, nor will you be allowed to pass thereon. The collector is responsible for the safe collection and keeping of nearly \$5,000,000, almost every dollar of which passes through the hands of the employes in his office. To hold that officer responsible, under the circumstances, for possible loss or default on the part of his employes whom he is not able to select, in whose appointment he has no choice, and whom he can in no manner control, is obviously a grave injustice. The only remedy, however, is either,

First. To apply to the City Council for the passage of an ordinance requiring that each one of your appointees who shall have the consent of the Mayor shall be confirmed by the Council, which method will prove burdensome to you, and impose much additional work upon the Council.

Second. To request the Legislature of Illinois to amend Section 11 of the Civil Service act so that there shall be excepted from the classified service all persons having the custody of public money for the safe keeping of which another person has given bonds. I am informed by one

who was instrumental in obtaining the enactment of the Civil Service law that it was intended that it should contain a clause of this character, and that its omission in the act as passed was the result of an oversight, and that there would be no objection to the incorporation of an amendment of this character in the law.

Third. To apply to the Civil Service Commissioners under Section 10 of said act for leave to make temporary appointments, the same to remain in force not exceeding sixty days, and until regular appointments may be made.

Of these three methods, while the last is temporary and may be resorted to to supply your pressing necessities, the second method is the more desirable, and the one which will furnish effectual relief not only for your office, but for those of the City Comptroller, the City Clerk, and the City Treasurer.

Very truly yours,
CHAS. S. THORNTON,
Corporation Counsel.

MAY 1, 1897.

MR. GEORGE C. HUNT, Inspector of Hospitals.

Dear Sir:

Your letter of April 30th, to the Corporation Counsel, in which you request an opinion in regard to the power of the Commissioner of Health in the matter of issuance of permits for hospitals, has been referred to me.

In reply will say there is nothing in either the ordinance of January 28, 1895, or May 25, 1896, referred to by you, which changes the provisions made by the ordinance of May 5, 1890, as amended on October 5, 1891 (see pages 131 and 132 Supplement to Myers' Laws and Ordinances, 1894), as to requiring the written consent of adjacent property owners to be filed with the Commissioner of Buildings before a permit issues for the construction or establishment of a hospital.

The ordinances of January 28, 1895, and May 25, 1896, relate entirely to the conduct, management and maintenance of a hospital, and do not conflict with, nor affect in any manner, the rule laid down by the ordinance of May 5, 1890,

above referred to. In my opinion the Commissioner of Health has full power to issue a permit for the conduct and management of a hospital, provided he is satisfied with the statements contained in the application for the permit as laid down in the two later ordinances referred to by you. The Commissioner of Health, however, is nowhere given the power to issue a permit for the construction or establishment of a building to be used as a hospital. The Commissioner of Buildings, only, is authorized to issue such permit, and only then, upon the filing with him of the necessary consents of adjacent property owners.

Very truly yours,
WM. H. ARTHUR,
Assistant Corporation Counsel.

MAY 7, 1897.

MR. JOS. S. MARTIN, City Collector.

Dear Sir:

Replying to your letter of inquiry concerning the Hyde Park saloon ordinance, a copy of which is hereto attached, I will first set forth the contentions of the Tosetti Brewing Company, viz:

First. That the entire ordinance is not in force to-day, since the annexation act does not operate to continue such an ordinance as this in force.

Second. That in the last case the President of the South Park Board could not sign a protest on behalf of the park frontage; also the Trustees for the Home for the Friendless could not sign.

Third. That the ordinance requiring the filing of the protest with the Village Comptroller must be nugatory because there is now no such office known.

Fourth. That the protest to be effectual must be signed by one-fourth of the property owners or householders upon both sides of the street.

Fifth. That in the case of the first two persons above mentioned, whose saloons are on the west side of Cottage Grove avenue, the property owners or householders on the east side of Cottage Grove avenue cannot sign a remonstrance

against the renewal of the licenses, because the east side is in a district in which saloons are entirely prohibited.

I shall now endeavor to answer them seriatim.

First. In answering the first proposition I refer you to the ordinance, a copy of which is hereto attached, and to Section 18 of the annexation act, a copy of which section is also hereto attached, and more particularly to that portion of the latter part of said section which is here quoted:

"It is intended by this section to continue in full force and effect all ordinances of any municipality the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dram shops is prohibited or regulated within said city, village or incorporated town, or any part thereof, without the voters of the territory so affected consent, as hereby provided, to the repeal of such ordinance by the city, village or incorporated town to which the territory is annexed."

Can any language be plainer than the foregoing? The ordinance is undoubtedly valid and in full force.

Second. My answer to the second proposition is, that, following the decision of Judge Tuley in *Vanderpoel v. The West & South Towns Street Railway Company*, reported in 26 Chicago Legal News, page 238, and the opinion of ex-Corporation Counsel John W. Green, page 123 of the "Opinions of the Corporation Counsel and Assistants," each of whom conclude, after elaborate citation and reasoning, that Park Trustees have not such proprietorship as would legally entitle them to include the park frontage in a petition for a street railway, the same rule would apply in this case, and the park frontage cannot be joined in protest by or through any of its officers. I am of the opinion, however, that the proper officers of the Home for the Friendless when authorized by the Trustees or Board of Directors may legally add the frontage of that institution to the protest.

Third. My answer to the third contention shall be brief, as I have practically answered it in the answer to the first contention. Of course if the protest is filed with the officer of the City of Chicago having jurisdiction similar to

that which the Village Comptroller of Hyde Park had previous to annexation, it is sufficient.

Fourth. The fourth contention is just, with a slight addition, as the ordinance says, "unless at least one-fourth of the property owners or bona fide householders, persons or firms doing business on both sides of the street in the block," etc.

Fifth. My answer to the fifth contention is that common sense should prevail in any interpretation of the law, and I have not, therefore, the slightest doubt that persons indicated by the ordinance may legally sign the protest, whether in the prohibition district or not, if they reside in what was formerly the Village of Hyde Park and are residing or doing business in the block in which the saloon or dram shop is located on either side of the street.

I have attached also all papers which have been referred to me in the Nottbohm and Smith protests, to both of which matters my opinion herein will apply.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

MAY 19, 1897.

JOSEPH KIPLEY, General Superintendent of Police.

Dear Sir:

Replying to your letter of the 18th inst., in which you express a desire to know whether offenses against the local option laws can be prosecuted before police justices only.

Section 1542 of the Municipal Code of 1897 of the City of Chicago prescribes that a police justice must also be a justice in the City of Chicago.

Section 1545 of the same prescribes that he shall receive a salary for his sole compensation.

Sections 1571, 1572 and 1573 of the same are here quoted:

"SECTION 1571. DOCKETS. The several justices of

the peace of the City of Chicago shall keep a full and complete docket of all city cases commenced, tried and disposed of before them, as well as all city cases which may come before them by change of venue from police courts or otherwise, and note upon said docket so kept what disposition was made as to fines and forfeitures, or steps taken in each and every case.

"SECTION 1572. MONTHLY REPORTS. The said several justices of the peace shall make upon blanks to be furnished to them reports to the City Comptroller at the close of each and every month, of all cases, fines and forfeitures for the violation of ordinances imposed, collected and paid to them, or execution issued during said month, with the name of the defendant, number of the execution, amount of the fine, fees and forfeitures collected, or otherwise disposed of.

"SECTION 1573. MONTHLY SETTLEMENT. The said several justices of the peace at the close of each and every month, at the date of making their said report to the City Comptroller, as directed, shall pay into the city treasury all fines and forfeitures for the violation of city ordinances when collected, and all other moneys collected by them for the use of the city, save and except their proper costs and charges."

Section 70 of Chap. 24, Starr & Curtis, 1896, reads as follows:

"JURISDICTION OF JUSTICES. And all justices of the peace and police magistrates shall have jurisdiction in all cases arising under the provisions of this Act (i. e. Cities, etc.), or any ordinance passed in pursuance thereof."

"The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, for regulating the jurisdiction and duties of justices of the peace, police magistrates and constables," etc., etc.

The above prohibition is in Section 22, Art. IV., Bill of Rights.

"Police magistrates and justices of the peace being the same officers in law, though different in name, are put in the same category."

The above is from the opinion in *People v. Palmer*, 64 Ill. 41.

There is no section in the Code giving police justices exclusive jurisdiction of city cases. The sections quoted from the Municipal Code more than imply that the jurisdiction of the regular justices of the city is co-ordinate with theirs. The 7th, 8th and 9th subdivisions of Section 16 of Art. 2 of Chap. 79 of Starr & Curtis, Vol. 2, Stat. 1896, give all the city justices, without discrimination, jurisdiction of certain actions for damages and prosecutions for fines to the amount of \$200 and \$100 respectively, under city ordinances.

I am of the opinion, however, that the city has the option of bringing all such prosecutions in the first instance before police justices, and in view of the regulation as to fees, I should think it a wise policy for your department to initiate all such prosecutions before the police justices, that the city may have the full benefit of the fines and fees, instead of having to "divide up" with those justices who, having no salary from the city, will reserve a sufficiency out of the fines and probably charge the city for fees in many cases where the prosecution fails.

On the question of the right of defendants to trial before the nearest justice, I quote the following section of Starr & Curtis, 1896.

Chap. 38, Sec. 526.

"When an arrest is made without a warrant, either by an officer or a private person, a person arrested shall, without unnecessary delay, be taken before the nearest magistrate in the county, who will hear the case, for examination, and the prisoner shall be examined and dealt with as in cases of arrests upon warrants."

Chap. 79, Sec. 164:

"Justices of the peace shall have original jurisdiction in all cases of misdemeanor, when the punishment is by fine only and the fine does not exceed two hundred dollars, and also in all cases of assault and assault and battery, and affrays, in which the people are plaintiffs, and in cases arising under the criminal code concerning vagabonds."

Chap. 79, Sec. 165:

"In all cases of offenses of which a justice of the peace has jurisdiction, he may, upon the affidavit of any competent person, issue his warrant to any constable of his county for the arrest of any person charged with either of said offenses, and upon the arrest of such person, shall proceed to hear and determine the cause according to law."

I find the following opinion by ex-Corporation Counsel Beale on the question of the right of a police justice to sit in another town than the one for which he had been appointed, which may be of interest to you in this communication:

"August 17, 1896.

"Hon. J. J. Badenoch, General Superintendent of Police.

"Dear Sir:

"Some time ago there was submitted to this office an inquiry whether a justice of the peace sitting as a police magistrate could hold his court in some other town than the one for which he had been appointed. I have had the matter under examination, and have been constrained to take considerable time, because there was so little authority to be found upon the subject. There is no occasion for me to take any further time upon the question, for I am satisfied that it is somewhat unsettled, or at least that it cannot be regarded as decisively settled. The intimation, rather than the flat decisions of the courts, seems to be toward the view that a justice cannot sit lawfully in any other town than the one for which he is appointed. In this condition of things I am compelled to advise your department that it would not be safe, in my judgment, to have a police magistrate from another town sitting in any police courts.

"Very truly yours,

"Wm. G. Beale,

"Corporation Counsel."

A justice of the peace having jurisdiction throughout his county, may issue any writ where he has jurisdiction, wherever he may be in the county, so that he makes it returnable to his office, which must be in his township.

For the above, see *Durfee v. Grinnell*, 69 Ill. 371.

A justice of the peace, though elected by the people of his town, has a jurisdiction which is co-extensive with the limits of the county in which such town is located. His process issues to any part of the county, and suits may be brought before him by persons residing anywhere in the county.

The above is from *Tissier v. Rheim*, 130 Ill. 110.

I glean from the foregoing that the defendant has no constitutional right to be tried before the *nearest* justice excepting where he is arrested without a *written* warrant; that where he is arrested in the county, of which county the justice who issued the warrant is a sitting justice, he must be brought before the justice who issued the warrant, and that his right to be tried before another justice is confined to such relief as he has under the change of venue statute for prejudice, and that this applies to and from police justices, as well as the ordinary justices.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

MAY 21, 1897.

MR. FELIX LANG, Superintendent of Water Office.

Dear Sir:

Your letter of the 18th inst., requesting an opinion as to the exemption of the premises at 4009 Drexel boulevard, occupied by the Mexican Consul, as the Consulate of Mexico, received.

Mr. Tolman in his letter to you of the 14th inst. quotes Article XXIX of the "treaty of amity, commerce and navigation" entered into between this country and the Republic of Mexico, under date of April 5, 1883. There is no such treaty. Mr. Tolman evidently meant to quote Article XXIX of the "treaty of amity, commerce and navigation" entered into between the United States of America and the United Mexican States under date of April 5, 1831.

Mr. Tolman's quotation is as follows:

“Article XXIX. It is likewise agreed that Consuls, Vice-Consuls, their Secretaries, etc. . . . they not being citizens of the country in which the Consul resides, shall be exempt from all compulsory public service and also from all kinds of taxes, imposts and contributions levied specially on them . . . or their property, to which the citizens and inhabitants, native and foreign, of the country in which they reside are subject, except those which they shall be obliged to pay on account of commerce.”

Article XXIX of the “treaty of amity, commerce and navigation” between the United States of America and the United Mexican States, under date of April 5, 1832, as set forth in “Treaties and Conventions concluded between the United States of America and other powers, since July 4, 1776, printed as Senate Executive Document No. 47, Forty-eighth Congress, second session,” is as follows:

“It is likewise agreed that the Consuls, Vice-Consuls, their secretaries, officers and persons attached to the service of Consuls, they not being citizens of the country in which the Consul resides, shall be exempt from all compulsory public service, and also from all kinds of taxes, imposts and contributions levied especially on them, except those which they shall be obliged to pay on account of commerce or their property, to which the citizens and inhabitants, native and foreign, of the country in which they reside, are subject; being in everything besides subject to the laws of their respective States.”

You will notice the difference between these two quotations of Article XXIX. Mr. Tolman says “levied especially on them . . . or their property, to which the citizens and inhabitants, native and foreign, of the country in which they reside are subject, except those which they shall be obliged to pay on account of commerce.” The Article as set out by me is:

“Levied especially on them, except those which they shall be obliged to pay on account of commerce or their property, to which the citizens,” etc.

To clearly understand the liability of the Consul to pay for water service it becomes necessary to consider whether or

not the rate charged for supplying water in Chicago is a tax.

I have made an extended investigation of this question and feel justified in holding that it is not a tax. The rates charged for supplying water are not a tax or assessment levied against the property or person, nor is the property or person subject to said rates, the ordinances not providing for a penalty, judgment, levy or sale of property on failure to pay such water rates. In my opinion it is a charge for water used by the person supplied; for goods sold and delivered, and if not paid, the city can cease to sell or deliver water until the amount due is paid.

The only power the city has to enforce payment of water rates is contained in the following: Section 2738 (page 747), Myers' Laws and Ordinances as in force April 2, 1890. (Sec. 1987—lately revised Laws and Ordinances, page 135) defining Water Rates, etc., says,

“and, every person who shall fail to pay his water rate or tax within two months from and after the expiration of the semi-annual period of each year herein prescribed for the payment of same, shall have the use of the water stopped until the full payment thereof, and all arrearage and charge for shutting off and turning on the water be made.”

I am clearly of the opinion that the Mexican Consul should not be exempted from the payment of the water rates.

Respectfully yours,

WILLIAM H. SEXTON,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

MAY 24, 1897.

JOSEPH KIPLEY, Chief of Police.

Dear Sir:

Your letter of the 19th inst., asking for information as to whether the Chief Veterinary Surgeon of the Police Department is exempted from classification in the classified Civil Service, received.

Section 11 of the Civil Service Act is as follows:

“OFFICERS EXCEPTED FROM CLASSIFIED SERVICE.

“Officers who are elected by the people; or who are elected by the City Council pursuant to the city charter, or whose appointment is subject to confirmation by the City Council, judges and clerks of election, members of any Board of Education, the superintendent and teachers of schools, heads of any principal department of the city, members of the law department, and one private secretary of the Mayor, shall not be included in such classified service.”

The Corporation Counsel on April 23d rendered an opinion to Hon. Carter H. Harrison, a copy of which opinion I send you, on the meaning of the words “heads of any principal department of the city.” A list of the officers exempted from classification in the classified Civil Service was given in the opinion. The position of Chief Veterinary Surgeon of the Police Department was not exempted by that opinion. I also call your attention to an opinion rendered to Hon. Carter H. Harrison on the 22d inst. by the Civil Service Commissioners upon the construction of the same phrase; “heads of any principal department,” etc., which opinion does not exempt the Chief Veterinary Surgeon of your department.

I am of the opinion that the position of Chief Veterinary Surgeon of the Police Department is not exempted from classification in the classified Civil Service.

Yours respectfully,

WILLIAM H. SEXTON,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

MAY 24, 1897.

ARTHUR R. REYNOLDS. M. D., Commissioner of Health.

Dear Sir:

I have your letter of May 19, 1897, in which you ask for my opinion as to whether the Commissioner of Health may secure to the institutions indicated a remission of the license fee exacted by Section 919 of the Municipal Code, on

recommendation to that effect to his Honor the Mayor, or whether an amendatory ordinance will be required to so remit the fee.

After investigation I do not find any authority given the Mayor to remit fees collected or to be collected in cases of this character. In case of *Washingtonian Home v. City of Chicago*, 157 Ill., p. 429, the court says:

“The revenue of a city cannot be donated by the officers of the city or by the City Council to any person they may think entitled to the same, but, on the other hand, such revenue can only be paid out or appropriated by the City Council or its officers in the manner and for the purposes authorized by law.”

I think an amendatory ordinance will be required to accomplish the ends you suggest.

Very respectfully,
LAWRENCE A. YOUNG,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

MAY 25, 1897.

MR. JOSEPH S. MARTIN, City Collector.

Dear Sir:

Your letter of the 17th inst., asking for an opinion on Section 1406 of the Revised Code, received.

Is a person, travelling from house to house, selling articles manufactured by a firm having a definite place of business, a peddler? He clearly is, under the Code, and the only question is, can he be so considered under the charter provision giving the city power to license peddlers?

Bouvier's Law Dictionary defines a peddler “as a person who travels about the country with merchandise for the purpose of selling.” Webster's definition is “A travelling trader; one who carries small commodities about on his back, or in a cart or wagon, and sells them.”

The Supreme Court of Illinois considers such a person to be a peddler as shown in a number of cases. In the *City*

of *Chicago v. Bartee*, 100 Ill., page 57, the court held that a milkman who went about selling milk was a peddler. The court said:

“The term ‘peddler’ is used in the charter in its general and unrestricted sense, and fully embraces persons engaged in going through the city from house to house and selling milk in small quantities to different persons; nor can it matter that appellee had regular customers to whom he daily sold his milk.”

It has been held in various cases that a drummer is not a peddler; that is where a man merely goes around soliciting orders to be filled by delivery at some future day, such a person is not a peddler. Neither is the delivering of goods in fulfillment of a previous order “peddling” within the meaning of the statute. See *Village of Cerro Gordo v. Rawlings*, 135 Ill. 36, and *Emmons v. City of Lewistown*, 132 Ill. 380.

From these decisions it is clear that the distinction is to be drawn between a man who delivers goods from house to house for a firm, without making any contract of sale, and a man who carries goods around with him expecting to find a customer for such goods during the day. Such a man as this is a peddler, and it makes no difference that he is employed by a firm having a regular place of business. Any man who sells from a wagon is a peddler.

The two orders issued by former Superintendents of Police referred to in your letter are quite consistent with this opinion. Thus the order of Superintendent Marsh is sound in saying that the delivering of goods in pursuance of a previous contract of sale does not constitute peddling. The same thing is true of the order of Superintendent McClaghry. In short, in order to constitute a man a peddler, it is essential that he should have his commodities with him personally, ready to offer the same for sale, and not in pursuance of some previous bargain.

Very truly yours,

CHAS. S. THORNTON,

Corporation Counsel.

MAY 27, 1897.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Yours of May 25th, to the Corporation Counsel, in which you request an opinion as to the liability of the City of Chicago for accidents occasioned by reason of a defective sidewalk on Jackson boulevard, and also as to the right of the city to "go in on the boulevard and repair the walk," has been referred to me for attention.

In my opinion the city cannot be held liable for accidents occasioned by a defective sidewalk on Jackson boulevard, nor would the city have the right to go upon the boulevard and repair a defective sidewalk thereon. This is so because, as has been held by the Supreme Court, the West Park Board has *paramount* and *exclusive* jurisdiction over the streets and ways committed to its charge under the several park acts passed by our Legislature.

In the case of *West Park Commissioners v. Chicago*, 152 Ill. 392, it was said:

"The West Park Commissioners are under the several park acts, a municipal corporation, which is not within the purview of its powers, subordinate to the City of Chicago, . . . there cannot be at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction and privileges."

In the light of the foregoing decision I therefore answer both your questions in the negative.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

MAY 31, 1897.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Replying to your letter of the 28th inst., with reference to the opinion of Assistant Corporation Counsel Arthur,

approved by me, with reference to the liability of the city for accidents occasioned by reason of the defective sidewalk on Jackson Boulevard, I have to say, that I have re-examined the same together with the letter of the Hon. Francis A. Riddle, which I herewith return, and I find no reason to modify the opinion heretofore enunciated.

In addition to what has already been written let me call your attention to the following language of the Supreme Court in the case of *West Chicago Park Commissioners v. Chicago*, heretofore referred to:

"It follows that the power of the Park Board over all these parks, boulevards and streets, for the purposes prescribed by these statutes, is plenary, while that of the city is wholly excluded. And this exclusion, so far as it relates to any power on the part of the city to govern, manage, control or interfere with these parks, boulevards and streets as such, is as complete as it would have been if the parks, boulevards and streets had been wholly withdrawn from the territorial limits of the city. Indeed, the legal effect of the various park acts would seem to be to take them out of the territorial jurisdiction of the city, so that, so far as the power of the city in relation to them is concerned, the corporate organization of the city is practically dissolved. . . . For all the purposes, then, of laying out, improving and maintaining parks, boulevards, streets and like public grounds, the city and the Park Commissioners occupy the legal position of two independent and co-equal municipalities, each vested with exclusive jurisdiction over the public grounds committed to its care, as trustee for the public. Neither can encroach upon the territorial jurisdiction of the other, but they stand, so far as these public grounds are concerned, in substantially the same legal relation to each other as though their territorial limits embraced adjoining but wholly separate areas. So far, then, as relates to all questions of street improvements, the West Chicago parks and boulevards are no more to be considered as a part of the city of Chicago than they would be if they were situated in the adjoining City of Evanston."

I am of the opinion, therefore, that the City of Chicago

cannot be held liable for accidents occasioned by defective sidewalks on Jackson boulevard; that thoroughfare being under the control of the West Park Board, as I understand it, and that the city has no right to enter upon the boulevard and repair the walk.

Very truly yours,

CHAS. S. THORNTON,

Corporation Counsel.

JUNE 3, 1897.

JOSEPH KIPLEY, Chief of Police

Dear Sir:

Your request for an opinion as to the duty of your department in caring for dead human bodies, coming into the care of police officers as such, received.

I am of the opinion from a careful reading of the Statute of the State of Illinois and the City Ordinances and the rules of the Department of Health that it is the duty of your department to care for dead human bodies. The coroner has control of the body for the purpose of holding an inquest and for no other purpose; it is his duty to go to the place where the body is found or has been conducted and hold such inquest (Sec. 10, Chap. 31, R. S.). All other control of the body devolves upon you and it is your duty to make such regulations as will enable police officers to properly discharge their duty.

Yours respectfully,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JUNE 9, 1897.

MR. JOSEPH S. MARTIN, City Collector.

Dear Sir:

In reply to your letter of June 4th, asking for an opinion from this department as to whether or not the City of Chicago has the power to license the American Phonograph Company, doing business at 57 State street, under the Amuse-

ment Ordinance, Chapter VI, Municipal Code of the City of Chicago, I submit the following:

In Starr & Curtis, Revised Statutes, the act for the Incorporation of Cities, Chapter 63, powers of the City Council, Clause 41, provides,

“The City Councils in cities shall have the power to license, tax, regulate, suppress, and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals, and other exhibitions, shows and amusements, and to revoke such license at pleasure,” and also in Clause 58, “to regulate places of amusements.”

The American Phonograph Company, from information the attorney for the company and the City Collector have given me, use kinetoscopes and phonographs as an advertising adjunct to its general supply business at 57 State street.

The company charges such person the sum of five cents for the use of the respective machines, that is five cents to hear a song or a speech, or to look at various pictures.

I think that so long as these machines are used for gain, hire, reward or profit, and are exhibited to the general public, they become exhibitions and amusements, and are a proper subject for license. Such amusements and exhibitions, undoubtedly come within the “Amusement Ordinance,” and it was clearly the intention of the City Council to license such devices.

Yours truly,
LAWRENCE A. YOUNG,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

JUNE 9, 1897.

MR. JOSEPH S. MARTIN, City Collector.

Dear Sir:

Some few days ago you requested me to investigate, for Chas. H. Slack, the right of the city to exact two licenses from a grocer who retails liquors of all kinds and in different quantities to his customers. I beg to submit to you the fol-

lowing: Chas. H. Slack conducts the business of a grocery at 42 Randolph street, Chicago. He sells various kinds of groceries, canned goods, etc., and those articles usually carried in stock by a first class grocer. Among other articles sold are liquors of many kinds, such as choice whiskeys, wines and beers. Slack has a "family trade" in these commodities. He sells and delivers by the pint bottle or gallon or case, whiskeys, wines, etc., to those persons who order from him. At his grocery store there is no bar or saloon arrangement or fixtures. No liquors are retailed unless in bottles, jugs or packages. For twenty years or more Slack has paid but one liquor license to conduct such a business of selling liquors. But under the Swift administration Slack and other grocers of his kind were required to pay two licenses, the dram-shop license of \$500.00 (required by Chap. 43, par. 16, p. 1601, Starr & Curtis' Rev. Sts.), and also the wholesale liquor dealers' licenses exacted by Chap. XXXIX, Articles 3, 4, 5, Municipal Code of Chicago. These licenses together with the dram-shop license amount to about \$700.00 per annum in Slack's case.

Slack is now desirous of paying only one license to sell his liquors to family trade as mentioned above, and an opinion is requested of this department as to whether such can be under the State and Municipal laws. Paramount to all our municipal law is the State law, relative to the sale of spirituous, vinous and malt liquors. Starr & Curtis' Rev. Sts., Chap. 43, p. 1587, provides "that a dram shop is a place where spirituous or vinous or malt liquors are retailed in less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act."

I take it by this enactment that Chas. H. Slack is clearly a "retailer" of spirituous, vinous and malt liquors, within the meaning of the statute.

Again, in par. 2, page 1587, it is enacted:

"Whoever, not having a license to keep a dram-shop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or in any quantity to be

drank upon the premises, or in or upon any adjacent room, building, yard, premises, or place of public resort, shall be fined not less than twenty dollars (\$20) nor more than one hundred dollars (\$100), or imprisoned in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court."

By this paragraph it is evident that two prohibitions are enacted by the State liquor laws.

(1) Whoever (meaning everybody) not having a license to keep a dram shop shall, etc., sell *any* liquor in any less quantity than one gallon (no matter where the liquor is drank or delivered), shall be fined and imprisoned, etc.

(2) Whoever, not having a license to keep a dram shop shall, etc., sell any liquor in any quantity to be drank upon the premises or in or upon any adjacent room, etc., shall be fined and imprisoned, etc.

If Slack's business is not included in these two paragraphs it is specifically mentioned in paragraph 7, page 1592, Starr & Curtis' Rev. Sts., where we find this provision:

"All places where intoxicating liquors are sold in violation of this Act, shall be taken, held and be declared to be common nuisances, and all rooms, taverns, eating houses, bazaars, restaurants, drug stores, groceries, coffee houses, cellars or other places of public resort, where intoxicating liquors are sold in violation of this Act, shall be deemed public nuisances; and whoever shall keep any such place, by himself, or his agent or servant, shall, for each offense, be fined not less than \$50 nor more than \$100, and confined in the county jail not less than twenty nor more than fifty days, and it shall be a part of the judgment, upon the conviction of the keeper, that the place so kept shall be shut up and abated until the keeper shall give bond, with sufficient security to be approved by the court, in the penal sum of \$1,000, payable to the people of the State of Illinois, conditioned that he will not sell intoxicating liquors contrary to the laws of this State, and will pay all fines, costs and damages assessed against him for any violation thereof; and in case of a forfeiture of such bond, suit may be brought thereon for the use of the county, city, town or village, in case of a fine due

to either of them. It shall not be necessary in any prosecution under this section to state the name of any person to whom liquor is sold."

This paragraph enacts that *all places* where intoxicating liquors are sold in violation of this act (that is, sold in quantities less than one gallon or sold in any quantity to be drank on the premises or in or upon any adjacent yard, etc.) are common nuisances, and in addition to *all places*, the statute names specifically all rooms, taverns, etc., *groceries*, coffee houses, etc., which are deemed public nuisances and violators of said act, shall be fined and imprisoned, etc.

In the Municipal Code of the City of Chicago, Chap. XXXIX, Article 1 (which ordinance was framed from the foregoing legislative enactment), in Section 1182, is the following:

"Any person who shall hereafter have or keep any saloon, tavern, grocery, ordinary, victualing or other house or place within the City of Chicago for selling, giving away, or in any manner dealing in intoxicating liquors in quantities less than one gallon, or who by himself, his agents or servants shall sell, give away, or in any manner deal in intoxicating liquors in quantities less than one gallon, or who by himself, his agents, or servants, shall keep a dram shop for the sale of liquors in quantities less than one gallon without a license therefor, in pursuance of this chapter, and other ordinances of the City of Chicago, shall, upon conviction, be fined not less than twenty dollars nor more than one hundred dollars for each and every offense."

And in Section 1184:

"No person shall hereafter, by himself, his agent or servant, solicit, ask or take any order from any person or persons within said city, for the sale or delivery of any vinous, spirituous, ardent, intoxicating or fermented liquors, in quantities less than one gallon, at any other place than that named in such person's license, or sell, offer for sale or deliver, any such vinous, spirituous, ardent, intoxicating or fermented liquors, in quantities less than one gallon, at any other place than that named in his license within the City of

Chicago, under the penalty of not less than fifteen dollars nor more than one hundred dollars for each offense."

After a careful consideration of the foregoing enactments, I think that Mr. Slack is compelled to pay the license of \$500 exacted from dram shop keepers, in order to retail his spirituous, vinous and malt liquors in less quantities than one gallon, or to offer for sale or to deliver any such liquors in less quantities, at any place other than that named in his license.

As regards the wholesale license or second license, should Slack pay that also? In the specific powers given the City Council by the General Incorporation Act for cities and villages, Chap. 63, Clause 46, S. & C. Rev. Sts., we find the following provision.

"The City Council shall have power to license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license."

Acting under this power given the City Council there are now several ordinances in full force and effect exacting a license from wholesale malt, wholesale spirituous and wholesale vinous liquor dealers as found in Chap. XXXIX, Articles 3, 4, 5.

Art 3, Section 1194 provides:

"No person, firm or corporation shall, within the City of Chicago, sell or offer for sale, any malt liquor in quantities of one gallon or more at a time, without having first obtained, as hereinafter provided, a license so to do for each place of business where such malt liquors shall be so sold or offered for sale, or for all wagons run for the purpose of such selling or offering for sale without any fixed place of business therefor. But no brewer, who has taken out a license as such, and who sells only malt liquors of his own production at the place of manufacture, shall be required to obtain the license herein prescribed, on account of such sales. The selling or offering for sale within said city of any malt liquor in quantities as aforesaid by a grocer or

bottler shall be held to be covered by this ordinance, and no grocer or bottler shall sell or offer for sale in said city any malt liquor in quantities as aforesaid without obtaining a license so to do under this article; provided, however, the sale and manufacture of weiss beer is exempted under the provisions of this article. Selling or delivery wagons run by a grocer, bottler or other vendor in connection with any place of business where malt liquors shall be sold or offered or kept for sale in quantities as aforesaid shall be included in and covered by the license for such place of business, and wagons run by a vendor without a fixed place of business shall be covered by a license specifically therefor."

Article 4, Section 1202, provides:

"No person, firm or corporation shall sell or offer for sale any spirituous liquors in quantities of one gallon or more at a time, within the City of Chicago, without first having obtained, as hereinafter provided, a license so to do, for each place of business where spirituous liquors are so sold, or offered for sale. But no distiller, who has taken out a license as such, and who sells only distilled spirits of his own production at the place of manufacture, shall be required to pay the license herein prescribed, on account of such sales."

Article 5, Section 1208, provides:

"No person, firm or corporation shall sell, or offer for sale, any vinous liquors in quantities of one gallon or more at a time, within the City of Chicago, without first having obtained, as hereinafter provided, a license so to do for each place of business where vinous liquors are so sold or offered for sale."

These ordinances classify liquor dealers and impose different license fees upon the different classes of dealers. They classify malt liquor dealers and those dealers who sell stronger drinks.

In the case of *Timm v. Mayor Harrison*, 109 Ill. 593, it was held to be proper to classify liquor dealers, and to impose different license fees upon the different classes, and also that the rule of uniformity in taxation would not be violated so long as the tax imposed is the same upon all the members of the particular class.

In case of *City of Cairo v. Feuchter Bros.*, 54 Ill., App. 112, the City of Cairo in an ordinance, No. 294, exacted the dram shop license of \$500 for the sale of liquors in less quantities than one gallon. In another ordinance, No. 513, there was exacted a license fee of \$100 upon every "wholesale liquor dealer," and this ordinance defined that business to be the selling or giving away of certain intoxicating drinks in quantities of five gallons or more. (The Chicago City ordinances of this character provide for the sale of one gallon or more.)

In another section the Cairo ordinance, No. 513, declared that the \$100 license exacted of wholesale liquor dealers should not apply to any one holding a valid license under ordinance No. 294 for the sale of liquors in less quantities than one gallon. The Court said, p. 114:

"There could be no doubt as to the validity of ordinance No. 513, were it not for the fourth section thereof. The city could exact one license fee of those selling in less quantities than one gallon, and another and different fee of those selling in quantities of five gallons or more, without the imputation of favoritism or unjust discrimination. Or, the city could fix a fee of more than \$500 for those selling in any quantities whatever, and a smaller fee for those selling in quantities of five gallons or more, and this classification would be reasonable and within the protection of the law. But in such case the fee for selling in any quantities whatever should be more than \$500, for this amount is the lowest fee authorized by the statutes for sales in less quantities than one gallon, and if no more is exacted for the general privilege, there is, in fact, no fee paid for selling in quantities of five gallons or more."

"This it is which constitutes the unjust discrimination. The man who sells in less quantities than one gallon, who is called the retail dealer in the argument of counsel, *can not carry on his business* as such retail dealer without paying a license fee of at least \$500. Another desiring to sell in quantities of five gallons or more is required to pay \$100 for the privilege, while the same privilege is given to the retailer gratuitously. This is manifestly unfair. Inasmuch as the *retail dealer gets what he pays for* when he is permitted to carry on the retail business, he should be accorded no more

privilege under the ordinance relating to wholesale dealers than would be extended to a licensed auctioneer or peddler who should desire to engage in the wholesale liquor business."

From the foregoing reasoning of the Appellate Court, I am of the opinion that if Mr. Slack desires to carry on the business of retailing liquors in *less quantities* than one gallon and also the business of selling all liquors in quantities of more than one gallon, that he (Slack) should not be accorded the privilege of conducting two distinct and separate branches of the liquor business by payment of *only one license*.

True, Slack has no bar or saloon arrangement in his store and sells liquors to his customers in bottles or packages only. But it is optional with him how and in what manner he prefers to dispose of his liquors and goods to his trade.

The foregoing statutes and ordinances are clear in their requirements, and I think a discrimination cannot be made in Mr. Slack's case.

No provision is made exempting his peculiar class from those who sell liquors in any quantity, and it is clear that two licenses are required when grocers conduct two distinctly different branches of the liquor business.

Respectfully submitted,

LAWRENCE A. YOUNG,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

JUNE 13, 1897.

TO THE COMMITTEE ON STREETS AND ALLEYS, West Division.
Gentlemen:

In answer to a communication dated June 9th, 1897, asking for an opinion as to the right of the City Council to grant a franchise to the Chicago General Railway Company to lay its tracks and operate its road on streets already occupied by other street railway companies, I submit my opinion as follows:

The right to use the public streets of the City of Chicago by any street railway company under the franchises now in

force is not exclusive. Street railway companies have no interest or title in the ground under their tracks, but the mere right to use the highway in common with the general public.

Camden Horse Railway Company v. Citizen's Coach Company, 31 N. J., Eq. 525.

The use of the streets of the city by the existing lines is only a use enjoyed in common with the public. A street car running upon rails laid upon the surface of the street is like any other vehicle passing along the street.

General Electric Railway Company v. Chicago City Railway Company, 66 Ill. App. 362.

"The use of a street for a horse (or electric) railway is such a use as falls within the purposes for which streets are dedicated, or acquired by condemnation."

C., B. & Q. R. R. Co. v. West Chicago St. R. R. Co., 156 Ill. p. 255. In the same case reading on page 272, it is said:

" . . . the interest of the street railway company, although a valuable one, is a part of the easement of the public in the street; it is carved out of such easement; it is accessory and ancillary to the existing right, vested in the public, of passing over the street . . ."

It has been decided by the Appellate Court that the franchise under which the Chicago City Railway Company has laid its tracks on Twenty-second street, east of the River (which street the proposed ordinance partly affects), is not an exclusive right.

Chicago General Railway Company v. Chicago City Railway Company, 62 Ill. App. 502.

The City Council has the right, in its discretion, to grant a franchise to a second company to operate its line on a street already occupied by a street car line, the only limitation being the practicable one that the use of the general public must be preserved and that there is space on the street for the tracks of both companies, and that the second use does not destroy the value of the first franchise.

Elliott on Streets and Roads, 566. Dillon on Municipal Corporations, Vol. 2, Sec. 727. *N. O. City Ry. Co. v. New Orleans*, 44 La. Ann. 728. 23 Am. & Eng. Ency. of Law, 992.

This is especially true where the new tracks only pass

through the streets occupied by the old company for short distances, or at particular points.

Also where the old company does not furnish accommodations to the public in the same directions, or the same territories, as the company under the new franchises.

Covington St. R. R. Co. v. Covington & Cincinnati St. Ry. Co. 19 Am. Law Register (new series), 765.

It may well be that for a time and under a particular set of circumstances, one road may furnish all the accommodation required by the public, or may so occupy the street that other tracks could not be laid without infringing on the rights of the public, or the franchise of the first grantee. At a later date, however, further accommodation to the public might be required to be furnished by a second road, or by reason of new appliances and new mechanical arrangements a second franchise might be granted to a new company without infringing on rights under the first franchise and on the rights of the public.

Covington St. R. R. Co. v. Covington & Cincinnati St. Ry. Co., Supra. St. Louis Ry. Co. v. Southern Ry. Co., 105 Mo. 577. *Jackson Co. Horse R. R. v. Inter. Rap. Transit R. R. Co.* 24 Fed. Rep. 306.

When the conditions set out exist, or when a proper occasion arises, the City Council has full right and authority to grant a second franchise.

Yours respectfully,
 GRANVILLE W. BROWNING,
First Assistant Corporation Counsel.

Approved:
 CHAS. S. THORNTON.
Corporation Counsel.

JUNE 14, 1897.

TO THE COMMITTEE ON GAS, OIL AND ELECTRIC LIGHT.

Gentlemen:

With reference to the ordinance giving power to Franklin H. Head, Franklin MacVeagh, L. L. Coburn, M. C. Bullock, Gilbert B. Shaw and others, to construct, maintain and operate gas works within the City of Chicago, I have to say, that I have fully considered the same and have heard argu-

ments with relation thereto presented by those representing the Civic Federation and Committee of One Hundred, recently appointed at a meeting held at the Central Music Hall, called for the purpose of denouncing legislation favoring other gas companies.

The ordinance in itself as drawn is, in my opinion, invalid, in that it gives a franchise to the gentlemen named, not for the purpose of enabling them to construct and operate gas works, but with the avowed purpose of enabling them to sell off the franchise to a corporation not yet in existence.

By the terms of the ordinance the power is given to the beneficiaries to tear up the surface of every street, alley and public place in the City of Chicago, to tunnel under the Chicago River, and to construct gas mains and gas works, a most valuable franchise, in return for which I cannot see that the City of Chicago is liable to be benefited to any extent whatever.

I am acquainted with some of the gentlemen named, and have for them the highest regard, and I appreciate the fact that the other gentlemen named, with whom I am not acquainted, have been very often designated by the press of the city as our very best citizens. While it is not to be thought for a moment that gentlemen of so high a standing would make use of an ordinance for their own private gain to the disadvantage of the city, yet the power given to convey to a corporation about whose membership we know nothing, and whose stockholders might use the franchise granted solely for the purpose of extorting money and not for the benefit of the public, renders the ordinance extremely dangerous. There is no provision that the City of Chicago shall receive a percentage of the profits derived from the exercise of this franchise, excepting a clause that twenty-five per cent of the stock shall be transferred to and held by the city, and that the city shall receive the income earned by this stock. It is obvious that a provision of this character may be rendered entirely nugatory by a majority of the stockholders, and that within a short time the City of Chicago for this valuable franchise which it is proposed to grant, would have nothing to show in return.

The representatives of the several associations who presented the matter upon behalf of the beneficiaries of this ordinance very generously stated that their entire action was guided not by any desire for private gain, but was dictated by a wish to help the public. It occurs to me, however, very forcibly, that the legislation which they are asking in the passage of this ordinance is infinitely worse and more dangerous for the citizens of Chicago than the measures which the Committee of One Hundred so loudly denounced at the Central Music Hall.

I am of the opinion, therefore, that the proposed ordinance, if passed, will be invalid, and that the same was not drafted in the interests of the public.

I am informed, however, that his Honor, the Mayor, has made certain suggestions to those interested in the enactment of this ordinance, which, if inserted, would amply protect the city. That, however, is a matter for future consideration.

Very truly yours,

CHARLES S. THORNTON,

Corporation Counsel.

JUNE 18, 1897,

MR. JOS. S. MARTIN, City Collector.

Dear Sir:

I have yours of the 17th inst. to the Corporation Counsel, in which you request an opinion as to what are your rights in the matter of collecting a license fee from parties operating pleasure boats in the various parks of the city.

It is well settled by the decisions of the Supreme Court of this State that the park boards are independent municipal corporations in themselves; that their jurisdiction within the purview of their powers is paramount and exclusive, and that for most purposes they are no more to be considered a part of the city than if they were situated without the limits thereof (see 152 Ill. 392 et seq.). Such being the case I do not believe you can collect a license fee for pleasure boats operated in the parks you named, to-wit: Lincoln, Humboldt, Garfield, Douglas, South and Jackson Parks.

Sections 181-2, Municipal Code of 1897, require the appli-

cation for a license to operate such boats to be made to the Mayor, and that the Mayor shall fix the place where such business shall be carried on. It is clear from the consideration of the case above referred to that the Mayor would have absolutely no authority to grant a license to operate boats for hire in any of the parks named, and not having any power to grant such a license I am of the opinion that the city cannot require a license fee to be paid it for the doing of something over which it has no control.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JUNE 19, 1897.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your letter of the 18th inst. received.

You ask for an opinion on the following proposition: Can the Commissioner of Public Works require the Chicago Electric Transit Company to improve the space outside of its rails and within its right of way with a pavement equal to the improvement constructed under a special assessment, levied by virtue of an ordinance passed by the City Council for the improvement of Irving Park boulevard with macadam pavement? You state that this company improved its right of way with cedar blocks in compliance with an order of former Commissioner Downey, and that it therefore denies the right of the city to compel it to now improve its right of way with a pavement equal to the improvement constructed under the special assessment.

I think its point is not well taken. Section 5 of the ordinance passed October 21st, 1895, granting a franchise to the Chicago Electric Transit Company to lay down, construct and operate a street railway in, upon and along Irving Park boulevard is as follows:

“Section 5. The said company, as to the parts of said

streets in and upon which its said railway may be laid, shall pave and keep sixteen feet in width in good condition and repair during all the time in which the privileges hereby granted shall extend, in accordance with whatever order, ordinance or regulation may be passed or adopted by the City Council in relation to such repairing; *and when any new improvement shall be ordered by the City Council of said part of said street, the said railway company shall, in the manner which may be required of the owners of the property fronting on said part of said street, make such new improvement for the width of sixteen feet;* and if the company shall refuse or fail so to do, the same may be done by the city, and the company shall be liable to the city for the cost thereof. Said railroad company shall pave the center sixteen feet of that part of said Irving Park boulevard and that part of Grace-land avenue hereby authorized to be used for railroad purposes at the time when its tracks shall be laid, and in event said street shall have been paved before said tracks shall be laid, said company shall refund to the property owners the cost of said sixteen feet."

The language of this section is explicit, and it is incumbent upon the Chicago Electric Transit Company to make the same improvements, in the same manner, as may be required of the owners of the property fronting on said part of said street. The rights of both the city and the Chicago Electric Transit Company in the premises are controlled by this section of the ordinance. The Commissioner of Public Works has the power to require said company to again improve the space outside of its rails with a pavement equal to the improvement constructed under the special assessment levied under the recent ordinance passed for the improvement of Irving Park boulevard with macadam pavement.

Yours respectfully,

WILLIAM H. SEXTON,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

JUNE 24, 1897.

MR. JOSEPH S. MARTIN, City Collector, City.

Dear Sir:

In reply to your letter of June 10th, asking for an opinion from this department as to whether the insurance tax can be exacted from the Indemnity Exchange, I submit the following:

The Indemnity Exchange appears to be an unincorporated aggregation of merchants and warehousemen of a selected class, who insure each other against loss by fire, in order to secure between themselves the safest protection at a minimum expense. Persons, firms and corporations desiring to gain the benefits of the Indemnity Exchange sign an ingeniously and carefully prepared power of attorney authorizing and empowering William Williamson to act for them and to carry out and consummate certain intentions. When this power of attorney is properly signed, these persons, firms and corporations are called "subscribers." The Exchange has no joint funds, capital or stock. The business affairs of the Exchange are transacted by an attorney and manager, William Williamson, and also by an advisory committee composed of five subscribers to the Exchange. This advisory committee is selected in the period between the first of December and the first of January each year, to serve as such for the succeeding year. This committee adopts suitable regulations for the government of the attorney; determines the qualifications and disqualifications of subscribers; also handles deposits and has charge of all moneys paid in by subscribers, and the investment of same.

The attorney is authorized to deduct from all premiums he may receive from all sources fifteen per cent before he deposits same with the advisory committee. This percentage is his compensation and for such sum he defrays all expenses of management, office expenses, salaries, rents and postage.

The losses, adjustment expenses, inspecting expenses, etc., are paid by the subscribers pro rata. After the power of attorney is signed the "subscriber" deposits a sum equal to twenty per cent of the amount which such subscriber agrees to underwrite on any one risk, which amount may, with the

approval of the advisory committee, be from time to time increased or diminished by any subscriber.

A blank form of a policy issued by the Exchange to a subscriber has been requested of the Exchange, and the request was refused, but I think we can assume that in substance it is similar to other fire insurance policies.

The foregoing are the salient features of the Indemnity Exchange, and from them I think it reasonable to deduce the following:

(1) An aggregation of a selected class of merchants and warehousemen brought together by a common and mutual understanding to indemnify each other in case of loss by fire.

(2) An advisory or executive committee chosen by all subscribers to superintend the affairs of the Exchange.

(3) An attorney and manager employed by all subscribers for the active management of the affairs of the Exchange, such as adjusting losses, inspection of risks, etc.

(4) There is a disposition of profits in proportion to each subscriber's deposit, if any profits are made by the Exchange.

(5) That the Indemnity Exchange is engaged beyond a doubt in the business of effecting fire insurance in the State of Illinois.

The statute under which it is sought to exact a tax from this "aggregation" of merchants and warehousemen is found in Starr & Curtis' Rev. Sts. (1896), Chap. 24, Par. 111, p. 733, Vol. 1, where it is enacted:

"All corporations, companies or associations not incorporated under the laws of this State, engaged in any city in effecting fire insurance, shall pay to the Treasurer the sum of \$2 upon the \$100 of the net receipts by their agency in such city, and at that rate upon the amount of all premiums which, during the half year ending on every first day of July and January, shall have been received for any insurance effected or agreed to be effected in the city or village, by or with such corporations, companies or associations, respectively. Every person who shall act in any city or village as agent, or otherwise, for or on behalf of any such corporation, company or association, shall, on or before the 15th day of July and January, in each year, render to the Comptroller (if

any there be, if not, to the Clerk), a full, true and just account, verified by his oath, of all premiums which, during the half year ending on every first day of July and January preceding such report, shall have been received by him, or any other person for him, in behalf of any such corporation, company or association, and shall specify in said account the amounts received for fire insurance. Such agents shall also pay over to the Treasurer, at the time of rendering the aforesaid account, the amount of rates for which the company or companies represented by them are severally chargeable by virtue thereof. If such account be not rendered on or before the day hereinbefore designated for that purpose, or if the said rates shall remain unpaid after that day, it shall be unlawful for any corporation, company or association so in default to transact any business of insurance in any such city or village, until the said requisitions shall have been fully complied with; but this provision shall not relieve any company from the payment of any risk that may be taken in violation hereof. Any person or persons violating any of the provisions of this section shall be subject to indictment, and upon conviction thereof, in any court of competent jurisdiction, shall be fined in any sum not exceeding \$1,000, or imprisoned not exceeding six months, or both, in the discretion of the Court. Said rates may also be recovered of such corporation, company or association, or its agent, by action in the name and for the use of any such city or village, as for money had and received for its use; Provided, that this section shall only apply to such cities and villages as have an organized fire department, or maintain some organization for the prevention of fires."

It will be seen that the statute provides among other things "*all . . . associations not incorporated under the laws of this State, engaged in any city in effecting fire insurance, shall pay to the Treasurer,*" etc. An ordinance in conformity with this State statute is found in the Revised Code of Chicago (1897), Section 700, p. 152, reading as follows:

"Any such corporation, company or *association*, not incorporated under the laws of the State of Illinois engaged in

the City of Chicago in effecting fire insurance, shall pay to the Treasurer of the City of Chicago, for the maintenance, use and benefit of the fire department of said city, a sum of money equal to the amount of *one per cent per annum of the gross receipts* received for premiums by the agency in said city of said corporation, company or association during the year ending on every first day of July, for any insurance effected or agreed to be effected in said city by or with such corporation, company or association. Such sum shall be paid, as aforesaid, on or before the fifteenth day of July of each and every year, and upon such payment a receipt shall be issued therefor."

This tax was decided to be constitutional in *Walker v. City of Springfield*, 84 Ill. 364.

From these provisions in both the state statutes and Municipal Code, I think it was clearly the intention of the lawmakers to require 'aggregations' such as the Indemnity Exchange to pay the tax and make their reports, if such aggregations are engaged *in the business of effecting fire insurance, whether incorporated or not.*

The framer of the "explanation of the Indemnity Exchange" cannot evade the state and municipal laws by such a subtle artifice as the play on words used. It will be seen that the Exchange is designated as an "aggregation," avoiding the usual word "association." Again the word "subscriber" is used to take the place of "member."

But further down in the "explanation" we find the following language used in explaining the duties of the attorney and manager:

"He also issues the policies for the subscribers, but no policies can be issued otherwise than to subscribers, as the *association* confines its operations strictly to its members." Also,

"He advises every subscriber monthly of the amount, character, and location of every risk in force; also of such new *members* as have been admitted."

I think, therefore, that as the Indemnity Exchange is *not incorporated* under the laws of the State of Illinois, and as its attorney and deputy attorney are engaged in the City

of Chicago *in effecting fire insurance* for the Exchange, that it should be compelled to pay the tax of one per cent of its gross receipts.

To accord the privilege of effecting insurance to the Indemnity Exchange, without a tax would be manifestly unfair and unjust to those companies which pay their taxes and make their statements yearly to the City Treasurer.

Respectfully submitted,

LAWRENCE A. YOUNG,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JULY 1, 1897.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Yours of the 29th ult., and therein enclosed correspondence from the Engineer of Track Elevation for the Chicago & Northwestern Railway Company, with the bill of the Suburban Gas Company for \$126.55 for changes of lamp-posts necessitated by the elevation of tracks, received.

In reply to your inquiry whether the City of Chicago is liable to the gas company for the amount of the bill, and if so, whether it can collect from the railway company, or whether the railway company alone is responsible to the gas company, will say, that I have carefully examined the ordinance providing for the elevation of the tracks of the Chicago & Northwestern Railway Company, passed March 30th, 1896. Sections 7 and 8 of said ordinance are the only sections that have a direct bearing upon this subject. Section 7 provides as follows:

“SECTION 7. Wherever, during the construction of said subways, it shall become necessary to change the location of water pipes, bricks or pipe sewers, and electrical conduits owned by the City of Chicago, all such may be deflected laterally from the position in which they may be found, or may be depressed in their trenches to such depth as may be necessary for their proper protection, or, they may be carried through

the subways, beneath the sidewalks, wherever the latter are sufficiently elevated above the roadways, as may be determined by the Commissioner of Public Works; but the gradients of the sewers shall not be reduced in any event; all of which said work shall be done by the said company and at its sole expense."

The above section expressly provides that all necessary change in the deflection or depression of water pipes, brick or pipe sewers, and electrical conduits owned by the city in the construction of subways is to be done at the sole expense of the railway company, but not one word is said about gas pipes or street lamps.

Section 9 reads as follows:

"SECTION 9. The location of the sidewalks in the subways, whose construction is herein authorized and required, the various devices for the drainage of said subways, and for the proper handling and protection of water pipes, sewers and electrical systems of the city, except as in this ordinance otherwise defined, shall all be determined by the Commissioner of Public Works; and all the work upon or in connection with any of the matters or things in this section specified, shall be done and performed under the superintendence and subject to the inspection and approval, and to the entire satisfaction of said Commissioner of Public Works aforesaid and all of the work of construction hereinbefore in this ordinance provided for shall be done at the expense of said railway company; not, however, including damages to adjacent property or business, caused by change of grade of streets, avenues, alleys or the railway, or by the vacation of any street, alley, avenue, or other public way, or by the performance by the railway company of the matters and things in this ordinance required of the railway, it being intended and understood that such damages, if any, are to be adjusted and paid by the City of Chicago."

The above section provides that the railway company shall not be liable for damages to adjacent property or business, caused by change of grade, etc., and that such damages, if any, are to be adjusted and paid by the City of Chicago. From this it would appear that the railway company is not liable to the gas company for damages done to said gas com-

pany in connection with the elevation of its tracks which necessitated the gas company to change its lamp-posts.

I have also made a careful investigation as to whether the gas company ought not to make these changes at its own expense. I have examined the ordinance of the Town of Lake View, under which said Suburban Gas Company was created; also the various agreements subsequently entered into by and between said gas company and the City of Chicago. Section 5 of said ordinance provides as follows:

“That whenever said town shall by ordinance order the permanent improvement of any street, it may by further order direct said company (Suburban Gas Company) to lay on such street its necessary pipes and house connections to all buildings along the line of such improvements.”

The elevation of tracks is a public improvement for the good of the public. It appears to me, therefore, that said gas company should make such changes in the lamp-posts necessitated by such public improvements as the elevation of tracks, at its own expense, and I am of the opinion that said gas company can be legally compelled to do so. I would therefore recommend that the city do not pay the bill in question.

Yours very truly,

N. L. PIOTROWSKI,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JULY 2, 1897.

TO THE HONORABLE, THE CITY COUNCIL.

Gentlemen:

May 3d, 1897, your honorable body passed a resolution requesting an opinion from the Corporation Counsel on the following question, viz.:

“Whether or not the City Council has the power to compel any of the existing gas companies to lay gas mains in resident districts?”

Until the adoption of the Constitution of 1870 special charters were granted by the Legislature of this State to gas

companies, conferring the privileges of laying gas mains in the streets. The Chicago Gas Light & Coke Company was incorporated by act of the General Assembly, approved February 9th, 1855. (Laws and Ordinances 1873, p. 172-173.)

This company derives its right to lay its mains and pipes in the streets of Chicago from the Legislature; therefore the City Council cannot compel said company to so extend its mains; the extent of its power being to establish proper regulations for the protection of the streets, and to prevent damages, etc.

(13th Cl. Sec. 63, Ch. 24, Incorporation Act, Starr & Curtis, p. 464.)

The People's Gas Light & Coke Company was incorporated by special act of the Legislature, approved February 12th, 1855, amended by an act approved February 7th, 1865.

(Laws and Ordinances 1873, pp. 174-175.)

The act gave the company power "to lay pipes for the purpose of conducting the gas in any of the streets and avenues of said city *with the consent of the City Council.*" The City Council of the City of Chicago passed on August 30th, 1858, an ordinance granting said company permission to lay its mains, pipes, etc., in the public streets and alleys of the said city. Whatever power the City Council may have to compel this company to extend its mains must be found in this ordinance. Finding no provision in the ordinance I am of the opinion that the City Council has no such power.

These two companies were incorporated by special acts of the Legislature. The Constitution of 1870 provided, in Section 22 of Article 4, that the General Assembly should pass no local or special law for "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever," and, in Section 1 of Article XI., "No corporation shall be created by special laws, * * * but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created." In pursuance of this section of the Constitution of 1870 the general incorporation act of 1872 was passed. All the existing gas companies except the two mentioned above

have been incorporated under the general incorporation act of 1872.

Section 1 of Article V. of the general act for the incorporation of cities and villages confers upon the City Council the power to regulate the use of the streets; "to regulate the openings therein for the laying of gas or water mains and pipes," and further, that any company "organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the Common Council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this State, subject to such regulations as any such city or village may by ordinance impose."

The gas companies now operating in the City of Chicago have all, with the exception of the Chicago Gas Light & Coke Company, derived the right to lay their pipes and mains in the streets and alleys of said city from the City Council. The ordinance in which this power is granted is a contract between the City of Chicago and the gas company receiving the franchise, and the city cannot, without the consent of the gas company, change the terms of the contract entered into by the ordinance, nor abrogate or nullify it.

State v. Laclede B. L. Co. Am. & Eng. Cor. Cases, 34, p. 19.

City of Quincy v. Bull, 106 Ill. 337.

City of Burlington v. Railway Co., 49 Iowa, 144.

Chief Justice Taney said, in the case of *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 428, and his language in that case was quoted by Mr. Justice Harlan, in the *N. O. Gas Light Co. v. Louisiana Light, etc., Company*, 10 Am. & Eng. Cor. Cases, 659:

" . . . For it can never be maintained in any tribunal in this country that the people of a State, in the exercise of powers of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of

all political institutions. It is equally clear, upon the same principle, that the people of a State may by the form of government they adopt, confer upon their public servants and representatives all the power and rights of sovereignty which they themselves possess; or may restrict them within such limits as they deem best and safest for the public interest.' After observing that the power of the State to make contracts may be indiscreetly and, for the public, injuriously, exercised, he proceeds: 'Yet if the contract was within the scope of the authority conferred by the Constitution of the State, it is, like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made the Constitution of the United States acts upon it, and declares that it shall not be impaired and makes it the duty of this court to carry it into execution. That duty must be performed.' "

In interpreting these ordinances the ordinary rules of interpreting contracts must be applied.

"In the absence of fraud or palpable abuse of discretion on the part of municipal authorities contracting for a water supply, the only question for judicial cognizance, in reviewing the contract, is whether there has been a violation of legal principles or neglect of any prescribed formalities."

Van Reipen v. City of Jersey City (N. J. Sup.) 33 A. 740.

"Where a city ordinance granting a franchise to a water company allowed the company to charge a certain price for water, and there was no provision in the city charter, or in the statute creating it, giving the Council power to repeal or alter the grant, a subsequent ordinance reducing the price one-half, and making it unlawful for the company to exact an amount in excess of such reduced price, and providing for the repeal of all conflicting ordinances is void."

City of Ashland v. Wheeler, 88 Wis. 607.

"The City of New Orleans was held to have the power to contract for a water supply under the provisions of its charter; and having this power to contract, it was held that the price, the kind of water and the amount, were matters of legis-

lative discretion vested in the City Council; and that when the city confined itself within the limits of its powers to contract, this legal discretion exercised by the City Council could not be inquired into by the courts, in the absence of fraud and corrupt and extravagant legislation."

Beach on Pub. Cor. p. 572.

Conery v. New Orleans Water Works Co. (1889) 41 La. Ann. 910.

Mayor, etc., of Rome v. Cabot, 28 Ga. 50.

I have examined a long line of authorities on the question of the liability of gas companies to supply gas, but all such authorities have been upon the question of such liability where the connections have been already made, the gas supplied for some length of time and then for some reason the service discontinued. I have been unable to find any authority which would warrant me in holding that a company can be compelled to do more than the provisions of the contract require.

I quote from some of the ordinances granting to the gas companies the right to lay their pipes and mains in the streets and alleys, the section providing for the extension of said pipes and mains.

Ordinance granting franchise to the Consumer's Gas, Fuel & Light Company, Sec. 2090a, page 801a, Myers' Laws and Ordinances, 1890:

"SECTION 2. . . . Said company shall, when ordered by a majority of the City Council, extend its main pipes in any block one-half of which shall be improved by buildings."

Ordinance granting franchise to the Equitable Gas Light & Fuel Company, Section 2891d, p. 801d, Myers' Laws and Ordinances, 1890:

"SECTION 2. . . . Said company shall, when so ordered by a two-thirds vote of all the Aldermen elected, extend their main pipes in any block three-quarters of which shall be improved by buildings."

Very nearly all the ordinances under which the existing gas companies in Chicago are operating contain no provision by which the gas companies can be compelled to extend their mains. However, these ordinances must be interpreted by

the same rules as all contracts. The city has been bound by the acts of its competent contracting officers and must stand or fall on their acts, not tainted by fraud or palpable abuse of discretion. Whatever power the City Council has to compel the gas companies to extend their mains in resident districts depends upon the terms of the ordinance under which the individual gas company operates; if the ordinance contains no provision for the extension of the gas mains the company operating under such ordinance cannot be compelled to so extend its mains; if the ordinance contains a provision for the extension of the gas mains, the City Council, acting under the provisions of the section in the ordinance in regard to extension of gas mains, can compel the company to so extend its mains.

Yours respectfully,
 WILLIAM H. SEXTON,
Assistant Corporation Counsel.

Approved:
 CHAS. S. THORNTON,
Corporation Counsel.

JULY 8, 1897.

MR. JOS. S. MARTIN, City Collector.

Dear Sir:

In reply to your letter of June 28th asking for an opinion from this department as to whether real estate firms, which have branch offices in different parts of the city, such as S. E. Gross & Co., and others, should obtain a separate license for *each* office so long as these offices are managed under the name of a firm with a licensed headquarters, I submit the following:

Specific authority is given the City Council to license avocations of such character in the act to provide for the incorporation of Cities. Starr & Curtis' Rev. Sts. Chap. 24, Par. 63, Clause 91, Page 714.

The ordinance by which such avocations or businesses are licensed was passed by the City Council June 11th, 1883 (Council Proceedings). Section 1 provides "it shall not be lawful for any person to exercise within this city the business

of a money changer . . . real estate broker, without a license therefor."

This ordinance was amended August 10th, 1883, and a license fee of \$25 was provided.

There is no provision in this ordinance which defines the mode or manner in which the business of a real estate broker is to be conducted, nor the place or places in which such business is to be carried on.

The license fee or tax in the case of brokers is exacted by the city to meet expense of supervision and inspection of that avocation. The more numerous the number of brokers offices to be inspected, the greater is the expense of the city to inspect them. I think the better reasoning is that those brokers who have several or more offices or many branch offices in this city, should bear their fair proportion of the extra expense to the city to supervise them. It is a well-known principle of law in this State that the provisions of our State Constitution as to equality and uniformity apply to property alone and not to taxation on privileges or occupations.

No one would contend that it would be equitable or just to permit a distiller, having branch distilleries; or a brewer, having branch breweries; or a lumber dealer, having branch lumber yards; or a livery stable-keeper, having branch stables, all scattered over different parts of the city, to conduct a separate and distinct business of his peculiar class under many different roofs, by payment of one license fee or tax. So it is with real estate brokers who have branch offices scattered over the city, and I think that a separate license should be exacted for each real estate broker's branch office, even though the firm headquarters is licensed.

Respectfully submitted,

LAWRENCE A. YOUNG,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JULY 8, 1897.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

An opinion is asked of this department relative to the power of the City Comptroller to bind the city by a lease, such as the one attached hereto.

I note that the lease is made to the City of Chicago, a municipal corporation, as party of the second part, and signed by "O. D. Wetherell, City Comptroller." The question that now presents itself is, has the City Comptroller power to bind the city by a contract of this character, acting for the city, singly or individually, in the capacity of City Comptroller?

In the general act for incorporation of cities, Starr & Curtis' Revised Statutes, Chap. 24, Par. 105, Page 731, the City Comptroller's powers and duties are defined.

"The City Comptroller (if there shall be any City Comptroller appointed, if not, then the Clerk) shall exercise a general supervision over all the officers of the corporation charged in any manner with the receipt, collection or disbursement of corporation revenues, and the collection and return of all such revenues into the treasury. He shall have the charge, custody and control of all deeds, leases, warrants, vouchers, books and papers of any kind, the custody and control of which is not herein given to any other officer; and he shall, on or before the fifteenth day of May, in each year, and before the annual appropriations to be made by the City Council or the Board of Trustees, submit to the City Council or Board of Trustees a report of his estimates, as nearly as may be, of moneys necessary to defray the expenses of the corporation during the current fiscal year. He shall, in said report, class the different objects and branches of expenditures, giving, as nearly as may be, the amount required for each; and for the purpose of making such report, he is authorized to require of all officers their statement of the condition and expenses of their respective offices or departments, with any proposed improvements and the probable expense thereof, all contracts made and unfinished, and the amount of any and all unexpended appropriations of the preceding year. He shall in such report show the aggregate income of the preceding fiscal year,

from all sources, the amount of liabilities outstanding upon which interest is to be paid, the bonds and debts payable during the year, when due and when payable; and in such report he shall give such other information to the Council or Board of Trustees as he may deem necessary, to the end that the City Council or Board of Trustees may fully understand the money exigencies and demands upon the corporation for the current year."

And further, in Par. 106:

"When there shall be appointed in any city a Comptroller, the City Council may, by ordinance or resolution, confer upon him such powers and provide for the performance of such duties by him, as the City Council shall deem necessary and proper; and all the provisions of this Act relating to the duties of City Clerk, or the powers of City Clerk in connection with the finances, the Treasurer and Collector, or the receipt and disbursements of the moneys of such city, shall be exercised and performed by such Comptroller, if one there shall be appointed; and to that end and purpose, wherever in this Act heretofore the word 'Clerk' is used, it shall be held to mean 'Comptroller'; and wherever the 'Clerk's office' is referred to, it shall be held to mean 'Comptroller's office.' "

It will be seen from these provisions that the act was intended to define the general duties of the City Comptroller, and as for other duties and powers, "the City Council may, by ordinance or resolution, confer upon him such powers, and provide for the performance of such duties by him as the City Council shall deem necessary and proper."

Many duties and powers of our City Comptroller have been conferred and defined by our City Council.

In the Revised Code of Chicago (1897) Sec. 6, the *Mayor and Comptroller* are authorized and empowered to sell and convey any and all lots and parcels of land to which a title is held by the city under sale and conveyance for the city taxes, etc.

Again,

Section 27 provides:

"Said Comptroller shall be charged with and shall exer-

cise a *general supervision* over all the officers of the city charged in any maner with the receipt, collection or disbursement of the city revenues, and the collection and return of such revenues into the city treasury. He shall be the fiscal agent of said city, and, as such *shall have charge* of all deeds, mortgages, contracts, judgments, notes, bonds, debts and choses in action belonging to said city, except such as are directed by law or ordinance to be deposited elsewhere, and shall possess and carefully preserve all assessment warrants, except warrants for the collection of water rates, or assessments, and the returns thereof made by any collector or receiver of assessments, and all leases of markets, wharfing privileges, and other public property of said city.

“*He shall have supervision* over the city debts, contracts, bonds, obligations, loans and liabilities of the city, the payment of interest, and over all the property of the city, and the sale or the disposition thereof; over all legal or other proceedings in which the interests of the city are involved, and shall have authority, with the approval of the Mayor, to institute or discontinue such proceedings, and to employ additional counsel, in special cases, where he thinks the city interests require it, and generally, in subordination to the Mayor and City Council, to exercise supervision over all such interests of said city as, in any manner, may concern or relate to the city finances, revenues and property.”

It will be seen here that a *general supervision* of certain officers and the *custody* of city deeds, mortgages, contracts, bonds, liabilities, etc., is given to the Comptroller.

But, where the Comptroller is given authority to *bind* the city by instituting or discontinuing legal proceedings or by employing additional counsel, *he must have the approval* of the Mayor.

In his supervision over the city finances, revenues and property, the Comptroller it will be seen, is *in subordination to the Mayor and City Council*.

Again:

In Section 31, “When provision for appraisers shall be made by a lease to which the corporation is a party, or in which it is interested, appraisers on behalf of the corporation

to determine the rent on renewal of the lease, or the value of buildings to be paid for on the expiration thereof, shall be appointed. The appraiser or appraisers on the part of the corporation *may be appointed by the Mayor and the Comptroller.*"

You will note in this section that no provision is made for the Comptroller to *lease* city realty in *his own name* and by *his individual act*, nor to bind the city by a lease of any other property for the use of the city.

Further:

In Section 1346, it is enacted that all bids for city printing received by the Comptroller shall be reported to the City Council for *approval*, and *approved* by that body *before* the Comptroller can let the contracts.

In none of the foregoing statutes and ordinances is specific authority given the Comptroller to bind the city by contract or otherwise without the approval of either the Mayor, City Council, or both.

I find also several provisions in Chap. 24, p. 727, of Starr & Curtis' Revised Statutes, and Par. 91, provides:

"Neither the City Council nor the Board of Trustees, nor any department or officer of the corporation, shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill of that year, except as is herein otherwise specially provided; and no expenditure for an improvement to be paid for out of the general fund of the corporation shall exceed, in any one year, the amount provided for such improvement in the annual appropriation bill; Provided, however, that nothing herein contained shall prevent the City Council or Board of Trustees from ordering, by a two-thirds vote, any improvement, the necessity of which is caused by any casualty or accident happening after such annual appropriation is made. The City Council or Board of Trustees may, by a like vote, order the Mayor or President of the Board of Trustees and Finance Committee to borrow a sufficient amount to provide for the expense necessary to be incurred in making any improvements, the necessity of which has arisen as is last above mentioned, for a space of time not exceeding the close of the

next fiscal year—which sum, and the interest, shall be added to the amount authorized to be raised in the next general tax levy, and embraced therein. Should any judgment be obtained against the corporation, the Mayor, or President of the Board of Trustees and Finance Committee, under the sanction of the City Council or Board of Trustees, may borrow a sufficient amount to pay the same, for a space of time not exceeding the close of the next fiscal year—which sum and interest shall, in like manner, be added to the amount authorized to be raised in the general tax levy of the next year, and embraced therein.”

It will be seen that this section forbids the City Council from adding anything to the corporate expenditures for such year over and above the amount provided in the “Annual Appropriation” of that year (found in Par. 90, p. 726), except when a necessity for an improvement has arisen by reason of a casualty or accident happening after the “Annual Appropriation” is made.

Then in Par. 92: “No contract shall be hereafter made by the City Council or Board of Trustees, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the City Council or Board of Trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided.”

This last paragraph refers to the exception mentioned in Par. 91, as no other can be found in the Act, and *that one* has no relevancy to this expense incurred by leasing the property mentioned in the lease.

It is very plain that this section contains *an express* prohibition against the Comptroller binding the city by incurring the expense in question, even if otherwise empowered to act, unless it is made to appear that a *previous appropriation* has been made by the City Council concerning the expense thereof and payment of same.

These statutes have become to the City of Chicago its organic law, and by the well settled principles of law, it therefore follows that neither the corporation, nor its officers, nor

any of them, can make any contract or incur any liability, not authorized by this organic law. This doctrine was approved and upheld in case of *Trustees of Lockport v. Gaylord*, 61 Ill. 276.

Dillon says in his work on Municipal Corporations, Section 457, "that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to *keep the corporate wings clipped down to the lawful standard*. It results from this doctrine that contracts not authorized by the charter or by other legislative act, that is, not within the scope of the powers of the corporation under any circumstances, are void, and in actions thereon the corporation may successfully interpose the plea of 'ultra vires,' setting up as a defense its own want of power under its charter.

In the case of *City of Chicago v. the Shoher and Carqueville Lithographing Co.*, 6 Ill. App. 560, the court held: "All persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or its officers to make contracts."

And also:

"The powers of the Comptroller of the City of Chicago are defined in Section 104 of the Incorporation Act, and among these powers, none can be found, express or implied, which authorize him to bind the city by incurring a debt for printing warrants to be used by the city."

It was held in case of *City of Alton v. John Mulledy*, et al., 21 Ill. 76.

"A city, as an incorporation, can only bind itself for the *payment of money* for labor done for its benefit, by ordinance or resolution, or it might by either of these modes authorize its officers or agents to make such contracts."

The powers of the Comptroller are defined in Par. 105, of the Incorporation Act, p. 731. Among those powers none can be found, either express or implied, which would authorize him to bind the corporation, by incurring the expense of rent-

ing the ground for a storage yard as mentioned in the lease.

It further appears that the City Comptroller was not authorized by an ordinance or resolution of the City Council to execute the lease in question, and that no appropriation has been made by the City Council to provide for the payment for the rent of this property.

After a careful consideration of these statutory and municipal enactments and authorities cited, I am of the opinion that the act of City Comptroller Wetherell in executing the lease in question was *ultra vires* and therefore void.

This "lease" is useful then only as a memorandum, which shows the business intentions of the parties.

The intention was to lease the property at 161 and 163 West Jackson street to be used by the Street Department of the City of Chicago for a storage yard. Rent was to be paid every three months in advance, in installments of \$168.

The city has entered upon the premises and taken possession thereof and used the same continuously for a period of over three months. The city therefore has become a "tenant from year to year," and is liable for the rent for one year from the date it entered upon and took possession of the premises described in the memorandum.

In Starr & Curtis' Rev. Sts., Chap. 80, Par. 5, Vol. 2, Page 2504, it is provided:

"In all cases of tenancy from year to year *sixty days'* notice, *in writing*, shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time *within four months preceding* the last sixty days of the year."

Respectfully submitted,

LAWRENCE A. YOUNG,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

JULY 14, 1897.

MR. JOSEPH S. MARTIN, City Collector.

Dear Sir:

In reply to your letter of June 28th, asking an opinion from this department as to whether a ticket broker (scalper)

could be compelled to pay a license, I submit the following:

The business of bartering, selling and transferring tickets of any railroad company or steamboat company operated within the limits of this State by an agent not authorized so to do, has been prohibited by the Illinois statutes. In Starr & Curtis Revised Statutes, Vol. 3, p. 3298, Chap. 114, Par. 132, I find the following legislative enactment and this statute has never been repealed:

“PAR. 132: That it shall be the duty of the owner or owners of any railroad or steamboat for the transportation of passengers to provide each agent, who may be authorized to sell tickets, or other certificates entitling the holder to travel upon any railroad or steamboat, *with a certificate setting forth the authority of such agent to make such sales; which certificate shall be duly attested* by the corporate seal of the owner of such railroad or steamboat.

“PAR. 133: *That it shall not be lawful for any person not possessed of such authority*, so evidenced, to sell, barter or transfer, for any consideration whatever, the whole or any part of any ticket or tickets, passes or other evidences of the holder's title to travel on any railroad or steamboat, whether the same be situated, operated or owned within or without the limits of this State.

“PAR. 134: That any person or persons violating the provisions of the second section of this act shall be deemed guilty of misdemeanor, and shall be liable to be punished by a fine not exceeding \$500, and by imprisonment not exceeding one year, or either, or both, in the discretion of the court in which such person or persons shall be convicted.

“PAR. 136: That it shall be the duty of the owner or owners of any railroad or steamboat, by their agents or managers, to provide for the redemption of the whole, or any parts of coupons of any ticket or tickets, as they may have sold, as the purchaser, for any reason, has not used, and does not desire to use, at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the proportion of said ticket was actually used; and the sale by any person of the unused portion of any ticket otherwise than by the presenta-

tion of the same for redemption, as provided for in this section, shall be deemed to be a violation of the provisions of this Act, and shall be punished as is hereinbefore provided: Provided, that this Act shall not prohibit any person who has purchased a ticket from any agent authorized by this act, with a bona fide intention of traveling upon the same, from selling any part of the same to any other person."

This act has been adjudicated by our Illinois Supreme Court in the exhaustive and able opinion of *Burdick v. The People of the State of Illinois*, 149 Ill., 600, and every paragraph of the act was upheld by that opinion of the Supreme Court.

Therefore the business of bartering, selling, transferring, etc., of railroad company and steamboat company tickets, by any other than an agent *authorized* by the respective companies to sell, barter and transfer railroad and steamboat tickets, is contrary to the laws of the State of Illinois.

I have been requested by the Counsel to the Corporation to ascertain if any ticket brokers (scalpers) are *authorized* by the several railroad companies to sell tickets for them, and if so, could such brokers be legally required to pay a broker's license?

I find that some of the railroad companies *pay these ticket brokers a commission* upon sales of tickets over their respective roads. But it is also a fact that *no ticket broker (scalper)* in this city is furnished with a *certificate, attested with the corporate seal* of the company, authorizing him to sell railroad tickets, as required by the plain provisions of the statute.

It was clearly the intention of the legislature by the foregoing enactment (pages 1 and 2 of this opinion) to prevent frauds upon travellers and passengers and railroad owners.

Until the statutes are complied with by the railroad companies, this method of selling railroad tickets upon commissions is also contrary to the laws of the State of Illinois.

"The power of municipal corporations to make by-laws," says Judge Cooley, "is limited in various ways."

The second way is as follows:

"Municipal by-laws must also be in harmony with the

general laws of the State and with the provisions of the municipal charter. Whenever they come in conflict with either, the by-laws must give away." (Cooley's Const. Limitation, 238-239.)

I think the City Council could not legally pass an ordinance licensing the business of a ticket broker (scalper) nor the business of those brokers who sell railroad tickets upon commissions (not having a certificate attested by the corporate seal setting forth the authority as required by the statutes).

If such ordinances were enacted by the City Council, they would be inconsistent with the laws of the State of Illinois and therefore void.

Respectfully submitted,

LAWRENCE A. YOUNG,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

JULY 15, 1897.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Replying to your letter of the 21st inst., wherein you inquire whether the city is liable to street car companies and railroad companies for costs incurred by such companies in protecting their tracks, replacing pavements, etc., which the companies under their franchises are required to keep in repair, when the same have been injured or destroyed by necessary public improvements carried on by the city:

In granting franchises and permits to use the streets or portions thereof to such companies as street railways and steam railroads, the city has generally required that these companies shall pave and keep in repair a portion of the streets over which they pass, evidently as a partial compensation to the public for the valuable rights which have been granted to them.

It seems reasonable to presume that, as these grants and requirements are given and accepted subject to the necessi-

ties and duties of a great city, which are of larger variety and more burdensome than those of a country village, the expression "keep in repair" meant much more to the contracting parties from the inception of the relation between them than the mere wear of surface travel.

I am therefore of the opinion that, if the city in making any public improvements contemplated or required by its charter finds its necessary to disturb or misplace any of those portions of the pavements or mains which said companies by their charters, grants or permits are bound to "keep in repair," the said companies and not the city should be required to pay the expense of restoration.

Respectfully yours,

J. R. CORRIGAN,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

JULY 19, 1897.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

After a careful investigation of the attached correspondence, which refers to the rights of the respective steamboat owners along the docks, piers and landings in the rear of Nos. 154 and 168 South Water street, I submit the following:

From the ordinances found in Laws and Ordinances of Chicago (1890), Sections 4548, 4570 inclusive, the City of Chicago has reserved and is entitled to a small strip of land at least five feet in width "next to and adjoining the river, which strip is to always remain an open wharf or dock for the free passage of persons on foot and that in no case shall passengers by water be subject to any charge for landing their ordinary traveling baggage . . . and that the top of said wharf shall be at all times properly planked or covered so as to afford a secure passage for such passengers and baggage."

This will appear from the foreclosed mortgages executed

by the old grantors based upon and adjusted by an act of Feb. 27, 1847.

I think the abutting property owners or lessors have not the power to lease these landings which have been expressly reserved by the City of Chicago.

In Starr & Curtis' Revised Statutes, Chap. 24, Par. 72, Page 721, it is provided:

"The city or village government shall have jurisdiction upon all waters within or bordering on the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the State."

Further, in the Incorporation Act, Starr & Curtis' Rev. Sts., Chap. 24, Par. 63, Clause 33, it is provided: The City Council shall have the power "To regulate and control the use of public and private landing places, wharves, docks and levees."

And in Clause 34:

"To control and regulate the anchorage, moorage and landing of all water-craft and their cargoes within the jurisdiction of the corporation."

In the Revised Code of Chicago (1897), Section 791, the City Council, acting upon the power given it by the State Statutes, has defined the Chicago Harbor.

"The harbor shall consist of the *Chicago River*, and its branches to their respective sources, including that portion known as the Ogden Canal, and all slips adjacent to and connecting with the Chicago River, the piers and basins, including the waters of the government breakwater which lie adjoining to, and extending three miles into the lake between the north and south lines of the city, and all the territory embraced between the limits of said survey as aforesaid shall be a portion of the harbor of the City of Chicago, and shall be subject to the control of the harbor master and to all the rules and regulations of this chapter or which shall be hereafter provided by the City Council. The words 'vessel,' 'crafts' and 'floats' shall be deemed to include every species of steam and other vessels lying or floating in or navigating the harbor."

In Clause 39, Chap 24, of the Incorporation Act. the

City Council is given power "to appoint harbor masters, and define their duties."

A part of such harbor master's duties have been defined in Section 798, Revised Code of Chicago (1897), as follows:

"The harbor master shall have the power to move any vessel, craft or float, while lying at any dock, wharf or pier, while receiving or discharging cargo or otherwise engaged, when in his judgment it is necessary so to do to facilitate the movements of other vessels, crafts or floats; he shall also have power, when in his judgment a vessel is so deeply loaded as to interrupt the traffic at the bridges or in the harbor, to tie up such vessel until such time as the said vessel shall have been lightened or a rise in water in the river may enable her to proceed; also to stop at any time or place such vessels, crafts or floats as may be proceeding up or down the river, so as to prevent a jam or blockade."

I am of the opinion that the City of Chicago has full jurisdiction over the Chicago River and the landings in dispute, and I think that the controversies along South Water street should be left to the harbor master to adjust.

Yours truly,

LAWRENCE A YOUNG,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

JULY 19, 1897.

JOHN POWERS, ESQ., Chairman of Finance Committee.

Dear Sir:

An opinion is asked of this department whether the City of Chicago should pay the expense of the "judicial election" held in June of 1897. I submit the following:

In the chapter on elections, Starr & Curtis' Rev. Sts., Chap. 46, Par. 327, it is provided:

"At all general county and State elections, which include officers elected through the whole county, though other than State and county officers are also elected, and at all exclusively judicial elections, and at all special elections for

a county or State officer, or member of Congress, or member of the Legislature, such county shall pay such judges and clerks of elections and official ticket holders for their services under this act."

I think by this provision it was intended that Cook County should pay the election judges, clerks of election and also the "official ticket holders" (if there were any serving), for services during our late judicial election. The question arises now, who shall pay the bills for printing and distributing ballots used at the judicial election?

You will please note that in the foregoing enactment the words "*general county and State elections*" are used. In the same volume and chapter, paragraph 165, it provides:

"That in all elections hereafter to be held in this State for public officers, except for trustees of schools, school directors, members of boards of education, officers of road districts in counties not under township organization, the voting shall be by ballots *printed and distributed at public expense as hereinafter provided*, and no other ballots shall be used."

Again, paragraph 166 provides:

"The printing and delivery of the ballots and cards of instruction to voters hereinafter described, shall, in *municipal elections* in cities, villages and incorporated towns, be paid for by the several cities, villages and incorporated towns respectively, and in town elections by the town, *and in all other elections* the printing of the ballots and cards of instruction for the voters in each county and the delivery of them to the several voting precincts and election districts shall be paid by the *several counties respectively*. The term 'general election' as used in this act, shall apply to any election held for the choice of a national, State, judicial, district or county officer, whether for the full term or for the filling of a vacancy. The term 'city election' shall apply to any municipal election held in a city, village or incorporated town."

I think it clear from this statute that the words "*and in all other elections*," refer to the term "general election," because the term "city election" applies to and is defined by the act to be "any municipal election held in a city, vil-

lage, or incorporated town." A judicial election being included in and classified as a general election, it follows that printing expenses incurred in a judicial election should be paid for as in all general elections (except municipal elections); that is, by the several counties respectively.

I think therefore that Cook County should also pay for the printing and distributing of the ballots and cards of instruction used at the late judicial election.

Respectfully submitted,

LAWRENCE A YOUNG,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

JULY 21, 1897.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

In regard to the application of the Illinois Central Railroad Company for a permit to construct two bulkheads to partly enclose and protect the entrance of the slip between 16th street pier and the main bulkhead, I am of the opinion that no legal objection exists to the issuance of such a permit. The Secretary of War has given the company permission to make the improvement, and it is merely a matter of discretion with you whether you do, or do not, issue the permit as desired. The city does not hazard its interests, or waive any rights by permitting the construction of these bulkheads, for the reason that the ownership of the land surrounding this particular place is still in dispute and is now in process of litigation between the people and the Illinois Central R. R. Co.

In the case of *Illinois Central R. R. v. Illinois*, 146 U. S., 387, the court says:

"The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights."

According to this decision no rights would be relinquished by the city, and, as I have already stated, the issuance of the permit rests in your discretion, there being no legal objection thereto.

In answer to your request for an opinion as to the extent of your jurisdiction and control over the lake front and the Chicago harbor, I have this to say:

The case in the 146th U. S. hereinbefore referred to, sets out the jurisdiction of the city over that part of the lake front and the bed of the lake lying between the north line of Randolph street and the north line of 12th street in the following words:

“The City of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph street and the north line of block twenty-three, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves, docks and levees, subject, however, in the execution of that power, to the authority of the State to prescribe the lines beyond which piers, docks, wharves and other structures, other than those erected by the general government, may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise.”

The State of Illinois by the charter given by it to the City of Chicago has delegated to the city full jurisdiction and control over the lake for a distance of three miles beyond the city limits, in the language following:

“The city or village government shall have jurisdiction upon all waters *within* or *bordering* on the same, to the extent of *three miles* beyond the limits of the city or village, but not to exceed the limits of the State.”

(Par. 72, Ch. 24, Starr & Curtis' Stat., Ill.)

The jurisdiction and control of the State of Illinois being thus given to the City of Chicago is of course vested in the City Council, and by various ordinances that body has clothed your department with full power and control over

the harbor which is defined by Section 791 of Revised Code of Chicago (1897), as follows:

“The harbor shall consist of the Chicago River and its branches to their respective sources, including that portion known as the Ogden canal, and all slips adjacent to and connecting with the Chicago River, the piers and basins, including the waters of the government breakwater which lie adjoining to, and extending three miles into the lake between the north and south lines of the city, and all the territory embraced between the limits of said survey as aforesaid shall be a portion of the harbor of the city of Chicago.”

Section 1605 of Municipal Code of Chicago, 1897, specially defines your duties in regard to the river and harbor among other things. Section 793 of the same Code provides that “no person or persons shall drive or place, or cause to be driven or placed any pile or piles, stone, timbers, earth or other obstruction in the harbor of the city without permission of the Commissioner of Public works.” Section 802 of the same Code requires a permit to be procured from you before any person can engage in “repairing, renewing, altering or constructing any dock within the City of Chicago.”

I am therefore of the opinion that, subject, of course, to any ordinances or orders which may hereafter be passed by the City Council, your department has absolute control over the harbor and lake front, and no improvements, alterations or construction of any kind should be permitted to be placed in, upon or along said harbor or lake front, without a permit from the Commissioner of Public Works, he being the head of that department.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JULY 28, 1897.

MR. JOSEPH S. MARTIN, City Collector.

Dear Sir:

You have requested an opinion from this department upon several questions and I shall answer them in order.

The ordinance upon which your questions are based was passed June 11, 1883, and is as follows:

"SEC. 1. It shall not be lawful for any person to exercise within this city the business of a money-changer or banker, broker or commission merchant, including that of merchandise, produce or grain broker, real estate broker and insurance broker, without a license therefore.

"SEC. 2. A merchandise, produce or grain broker is one who, for commission or other compensation, is engaged in selling or negotiating the sale of goods, wares, merchandise, produce or grain belonging to others.

"SEC. 3. A real estate broker is one who, for commission or other compensation, is engaged in the selling of or negotiating sales of real estate belonging to others or obtains or plans loans for others on real estate.

"SEC. 4. An insurance broker is one who is engaged in procuring or places insurance on buildings, vessels and other property, for others.

"SEC. 5. There shall be collected, annually for every license granted for any banker, the sum of \$100; and there shall be collected, annually, for every license granted for any broker, or commission merchant, or money-changer or broker, the sum of \$25; and there shall be collected, annually, for any license granted any real estate broker, the sum of \$25; and there shall be collected, annually, for every license granted for any insurance broker, the sum of \$25.

"SEC. 6. That any person violating any provision of this ordinance shall be subject to a penalty of not less than \$25 nor more than \$100, and to the same penalty for every subsequent violation thereof."

Question First: "Are bankers who do a loan business (National banks excepted) subject to a broker's license?"

In the case of *Braun v. City of Chicago*, 110 Ill., p. 194, a "broker" is defined to be "one who is engaged for others

in negotiating contracts relative to property with the custody of which he has no concern." This definition is clear and concise and admits of no argument. If the bankers referred to conduct such a business, they are clearly "brokers" and should be required to pay the license fee exacted of brokers.

Question Second: "Does the broker's license apply to members of the Board of Trade, Stock Exchange, Grain Commission merchants and commission merchants who deal in perishable goods, vegetables, fruits, etc.?"

Those persons engaged for others in negotiating contracts relative to property are of two classes.

(1) *A broker*, "one who is engaged for others in negotiating contracts relative to property *with the custody of which he has no concern.*"

(2) *A factor* "is an agent who is commissioned by a merchant or other person to sell goods and receive the proceeds." Also, "an agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation called his 'factorage' or 'commission.'"

Also:

"A factor or commission merchant may buy and sell in his own name and he has the goods in his possession. A broker cannot ordinarily buy and sell in his own name."

The City Council is given specific authority, by the Incorporation Act, Chap. 24, Par. 63, Clause 91, "to tax, license and regulate auctioneers, brewers, lumber yards, livery stables, public scales, money changers and *brokers.*"

There is no authority given to license "*factors*", and the provisions of the charter permitting the City to regulate (and license) certain occupations are in effect a prohibition against its interference with business concerning which the charter makes no mention. *City of Cairo v. Bross*, 101, Ill. 475, and *Holder v. City of Galena*, 19 Ill., App., 409; *Keim v. City of Chicago*, 46 Ill., App. 445.

Wherever you find in your inspection, that members of the Board of Trade, Stock Exchange members, grain commission merchants and commission merchants, engaged for oth-

ers in negotiating contracts relative to property, with the custody of which they have no concern, they are "brokers", and you should require a license from them.

In the eyes of the law no distinction is made, because the persons are engaged in business as both brokers and factors, and you should exact a license from that class of brokers who are engaged in two such distinctly separate branches of business. But where a factor (see definition) cannot be classed as and does not carry on the business of a "broker", then you cannot exact a license fee from him.

In the case of *Braun v. City of Chicago*, 110 Ill., the court said:

"It was stipulated that Braun was engaged in selling, in the city, produce, such as butter and eggs, *belonging to other persons*, when sent to him for that purpose; that he sold to such persons as would buy; *that he also negotiated sales of such produce for others, without having possession of the property*,—and for such business so conducted by him he received as compensation therefor a percentage on the gross amount of such sales. It was also stipulated that appellants Lyman & Giddings were engaged in the city in negotiating the sale of, and did sell, real estate, situated in the city and elsewhere, for persons owning the same, and in bringing together persons desiring to sell and purchase, and they sold such property, and for such services they received a compensation determined by receiving a certain percentage on the price of real estate sold, or received a specific sum agreed upon between them and the seller."

The Supreme Court said in the opinion, pages 194 and 195:

"It is further insisted that the 91st clause of Section 62 of the City Charter does not confer power on the city to demand a license fee, in these cases, for the privilege of pursuing the various occupations of brokers. It is claimed that these appellants are not brokers,—that Braun is a commission merchant, and Lyman & Giddings are real estate agents, and neither calling is embraced in that clause of the charter, and not in fact being brokers, they were not required to procure licenses to exercise their callings. Lexico-

graphers of high authority have defined the term 'broker' to be one who is engaged for others in negotiating contracts relative to property with the custody of which they have no concern, and this is the precise technical meaning of the term. A factor is one who sells property of others when he has its possession. Here, Braun negotiated sales of property of which he never had possession, which brings him within the definition, and Lyman & Giddings only sold property of others of which they had no possession. This brings them within that clause of the charter, and the power of the city to demand a license fee, and to impose a penalty for not procuring a license before commencing and transacting their business."

Question Third: "Should lumber brokers be required to pay a broker's license?"

Those lumber brokers who are engaged for others in negotiating contracts relative to lumber, etc., with the custody of which they have no concern, should be required to pay the broker's license fee.

Question Fourth: "Do collection agencies come under this ordinance?"

They do not, and no provision is made to license collection agencies by the ordinance and no authority is given the City Council by the City Charter to license collection agencies.

Question Fifth: "Must one who loans *his own* money on commission pay a license?"

Such a person *is not* within the definition of a *broker* and no authority is given the City Council by the City Charter to regulate and license a lawful business of this character, and therefore no license can be exacted.

Yours truly,
LAWRENCE A YOUNG,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

AUGUST 5, 1897.

ARTHUR R. REYNOLDS, M. D., Commissioner of Health.

Dear Sir:

I have had referred to me for attention your letter of July 31st to the Corporation Counsel, relative to the dumping and depositing of river and harbor dredgings in the lake. You also request advice from this department as to the proper course for you to pursue in order to prevent the pollution of the water supply of the city, resulting from the practices of which complaint is made.

I am of the opinion that the city charter and the ordinances of the city passed pursuant to the power vested by that charter clothe you with ample authority to prevent any act or acts which result, or are likely to result, in the pollution of the water supply. The preservation of the purity and wholesomeness of the city water supply is a matter of very grave importance, and as such has been recognized by the State Legislature as shown by its enactments, at various periods, of statutes looking toward protection of the water supply of cities and villages.

The first enactment bearing directly upon this subject was that of 1872, and is as follows: "For the purpose of establishing or supplying water works, any city or village may go beyond its territorial limits and may take, hold and acquire property by purchase or otherwise; shall have power to take and condemn all necessary lands or property therefor, in the manner provided for the taking or injuring private property for public uses; and the jurisdiction of the city or village to prevent or punish any pollution or injury to the stream or source of water, or to such water works *shall extend five miles beyond its corporate limits*, or so far as such water works may extend."

The next enactment upon this subject was that of 1873, authorizing cities, etc., to construct and maintain water-works, and is as follows: "For the purpose of erecting, constructing, locating, maintaining or supplying such water-works, any such city, incorporated town or village, may go beyond its territorial limits, and may take, hold and acquire property and real estate, by purchase or otherwise; and shall

also have the power to take, hold, acquire and condemn any and all necessary property and real estate, for the location, erection, construction and maintaining of such waterworks in the manner provided for the taking and condemning of private property for public use . . . *and the jurisdiction of such city, town or village, to prevent or punish any pollution or injury to the stream or source of water, for the supply of such waterworks, shall extend ten miles beyond its corporate limits.*"

Under the provisions of the act last quoted, the city is clothed with ample jurisdiction to prevent pollution of its water supply for a distance of ten miles into the lake beyond its corporate limits. The City Council acting under the authority conferred by the several acts, has enacted ordinances which fully enable you, and make it your duty as Commissioner of Health, to prohibit the practices complained of in your letter.

Section 810 of the Revised Code of Chicago (1897) makes it your duty "to enforce all the laws of the State, and ordinances of the city in relation to the sanitary regulations of the city" and certainly the protection of the city's water supply comes properly under the head of a "sanitary regulation of the city."

Again, Section 789, Revised Code of Chicago (1897), covers this matter explicitly in the following language: "No person shall cast or deposit, or suffer to be cast or deposited in the harbor of the City of Chicago, *or within five miles of the harbor, any earth, ashes, or other heavy substance or substances, filth,*" etc.

This section further provides a penalty of not less than fifty dollars nor more than one hundred dollars for a violation thereof.

Under this section last quoted, you have the power to prevent the dumping and depositing of dredging and other substances which would tend to pollute the water supply, within a distance of eight miles out from the shore, for the reason that the harbor, as defined by Section 791 of the Revised Code, extends three miles into the lake between the north and south limits of the city.

I believe the proper course for you to pursue in this matter would be to swear out a warrant for any person found violating the provisions of Section 789 of the Revised Code of Chicago (1897). I note that you complain that government contractors are the chief offenders in this respect. The fact that it is a government contractor who is a violator of the ordinance, should make no difference so far as the enforcement of that ordinance is concerned. There is no special sanctity surrounding the person of one having a government contract which renders him less amenable to the operation of the city ordinances than a less fortunate mortal; and a government contractor should be dealt with in precisely the same manner as other offenders would be.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

AUGUST 5, 1897.

MR. R. A. WALLER, Comptroller.

Dear Sir:

One George B. Russell was elected by the Town of Calumet, April 20, 1897, to the office of "pound master" and has established a pound at 87th and Halsted streets. This portion of the Town of Calumet was annexed to the City of Chicago by the ordinance of February 25, 1895, and Russell's pound is therefore within the city. Russell has defied the city authorities, claiming the right under his commission to act for the whole town of Calumet, including that portion which is a part of the City of Chicago. You ask what are the city's rights in the matter, and I submit the following:

All pound masters who serve the City of Chicago are appointed by the Mayor; Rev. Code, Sec. 1576.

Therefore, it is unlawful for other than the Mayor's appointees to serve the city as pound masters.

In the Criminal Code, Hurd's Stats., Chap. 39, Sec. 102, it is provided: "Whoever falsely assumes or pretends to be

a Justice of the Peace, Sheriff, Deputy Sheriff, Coroner, Constable, Police Officer, Watchman, or other officer, and takes upon himself to act as such, or to require any person to aid or assist him in a matter pertaining to the duty of any such officer, shall be confined in the county jail not exceeding one year, or fined not exceeding \$500."

The words "or other officer", I think includes the office of poundkeeper. Mr. Russell cannot act as a poundkeeper within the City of Chicago, without a commission from Mayor Harrison, and if he continue to defy the authorities he is amenable to the Criminal Statutes above set forth.

An opinion is also requested as to what power the Mayor or Comptroller has in the matter of releasing a fine where animals have been impounded.

Rev. Code of Chicago, Sec. 1592, provides: "Each and every poundkeeper of the city shall by the end of each month pay to the Comptroller of the City all moneys received by him over and above the expenditures for the maintenance of the pound," etc.

Such fines, collected or uncollected, belong to the City of Chicago after certain incidental expenses are deducted therefrom.

In Hurd's Stat., Chapter 24, page 260, it is provided in the enumeration of duties and powers given the Mayor: "He may release any person imprisoned for violation of any city ordinance, and shall report such release, with the cause thereof, to the council at its first session thereafter."

Neither the Mayor nor Comptroller has authority to release or remit fines.

Very truly yours,
LAWRENCE A YOUNG,
Assistant Corporation Counsel.

Approved:
CHAS. S. THORNTON,
Corporation Counsel.

AUGUST 19, 1897.

MR. FRED E. ELDRED, City Sealer.

Dear Sir:

Your letter of the 13th inst., requesting advise as to your right to inspect slot-machines for weighing, placed at the stations of the elevated railways, with the attached correspondence, has been referred to me.

Your attention is called to the three sections of the ordinance on Weights and Measures here quoted:

2007. "It shall be the duty of said inspector to inspect and examine once in each and every year, all weights, measures, scale beams, patent balances, steelyards, and other instruments used for weighing and measuring in the City of Chicago, except all track scales of a capacity of three tons or upwards, which shall be inspected once in every six months and to stamp with a suitable seal all weights and measures and scales so used which he may find accurate, and deliver to the owner thereof a certificate of their accuracy."

2012. "Said inspector shall examine and inspect and seal all weights, measures, scale beams, patent balances, steelyards, and other instruments used for weighing at the stores and places where the same may be used; but in case they, or any of them, shall not be conformable to the standard of this State, they shall be marked 'condemned' and the owner thereof shall within ten days thereafter have the same properly adjusted and sealed, under a penalty of not more than ten dollars and the inspector may, at any time after the expiration of the time aforesaid seize and destroy any and all such condemned weights, measures, scale beams, patent balances, steelyards, and other instruments used for weighing found in use."

2015. "The inspector of weights and measures shall be entitled to demand and receive before the delivery of said certificate mentioned in Section 2007 the following fees:

[Here follows schedule of fees.]

The following sections of the ordinance are here also quoted for comparison with the foregoing:

Sec. 2018. "All persons using weights, measures, scale beams, patent balances, steelyards, or any other instrument,

in weighing or measuring any article intended to be purchased or sold in the City of Chicago, shall cause the same to be inspected and sealed by the Inspector of Weights and Measures in said city."

Sec. 2021. "Any person who shall, in weighing or measuring any article for purchase or sale within the City of Chicago, use any weight, measure, scale beam, patent balance, steelyard, or other instrument, not sealed, or without first having obtained the aforesaid certificate, from the Inspector, as required by this chapter, shall forfeit and pay the sum of not more than twenty-five dollars for each and very offense."

Sec. 2022. "If any person shall use, in the City of Chicago, in weighing or measuring, as aforesaid, any weight, measure, scale beam, patent balance, steelyard, or other instrument, which shall not be conformable to the standard of this State, or shall use in weighing, as aforesaid, any scale beam, patent balance, steelyard, or other instrument, which shall be out of order or incorrect, or which shall not balance, he shall forfeit and pay for every such offense the sum of not less than twenty-five dollars."

You will notice that Sec. 2007 makes it your duty to inspect all instruments used for weighing. This plainly includes these slot-machines. Sec. 2012 also authorizes you to inspect and seal the same, and provides the penalty. Nothing appears in either of these two sections from which it can be inferred that the machines referred to are those used only for *the weighing and measuring of articles intended to be bought and sold*.

The other three sections quoted prescribe other and further regulations and penalties, which only apply to such machines and measures as are used for the *weighing and measuring of articles to be purchased and sold*. While I think you may inspect, seal, and enforce the penalty named in Sec. 2012, against the slot-weighing machines, I think you cannot enforce the requirements and penalties named in Sections 2018, 2021 and 2022 against them.

Your fee for such inspection should be governed by that subdivision of Section 2015, which I have underscored.

The charter power under which the ordinance becomes effective is in dual form, and is as follows, viz: 55th Sub. of Par. 63, Ch. 24, Starr & Curtis.

“To provide for the inspection and sealing of weights and measures.”

56th Sub. of Id.

“To enforce the keeping and use of proper weights and measures by vendors.”

The words “by vendors” are omitted from the 55th Sub., apparently for the purpose of allowing the City Council to provide for the inspection and sealing of such weighing machines as those referred to in your communication, and I take it that the doubt as to the application of the ordinance, if any doubt there be, has grown out of these dual charter powers, and the consequent dual quality of one ordinance based upon both.

They are operated for gain, the fee demanded is received by the owners as a consideration for the correct measuring of the weight of the person or thing to be weighed.

It would be contrary to reason, in my opinion, that the plain language of the ordinance should be construed to except one class of weighing machines, which as your correspondent truthfully suggests, can become so unreliable without inspection as to be the means of a constant swindle of the public.

I am therefore of the opinion that it is your duty to inspect and seal them.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

SEPTEMBER 7, 1897.

MR. GEO. K. WHEELOCK, Chief Engineer.

Dear Sir:

On June 29, 1897, I sent you an opinion as to which ordinance was the proper one under which to proceed with

the improvements to be made upon Seventieth street, between Stony Island avenue and Cregier avenue. Since that opinion was sent to you, a new state of facts pertinent to the several ordinances in question have been presented to me, and consequently a new opinion is necessary. I submit the following:

It appears that the ordinance of March 8, 1895 (p. 2751, C. P.) established and fixed the width of the roadway of 70th street at 46 feet, 23 on each side of the center of the street. This ordinance *did not order the street improved*, but merely established curb lines.

The ordinance of July 18, 1895, ordered the improvement of 70th street, and established the roadway at 38 feet. I shall quote several portions of this ordinance, which clearly establish the width of the roadway. Sec. 1. "That the roadway of 70th street, from the east line of Stony Island avenue to the west curb line of Cregier avenue, in said City of Chicago, said roadway being 38 feet in width, be and the same is hereby ordered curbed," etc.; also: "Said curbstones to be set on either side of the roadway of said 70th street between said points, at and on a line parallel to and nineteen feet from the center line of said roadway."

The language just quoted, beyond a doubt, also establishes the curb lines of 70th street, and fixes the width of the roadway at thirty-eight feet. The ordinances of March 8, 1895, and of July 18, 1895, are positively repugnant, and to such an extent that they cannot be reconciled and made to stand together by any reasonable construction.

Black on Interpretation of Laws, p. 112, says: "Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand, and to comprise in itself the sole, and complete system of legislation on that subject.

Also on p. 113 (at bottom):

"But if two acts are positively repugnant, and to such an extent that they cannot be reconciled and made to stand to-

gether by any fair and reasonable construction, then the *one last issued will control* and will repeal the earlier law."

Also, Dwarris on Statutes, 673.

This doctrine has been upheld by our Supreme Court in many decisions. The latest cases I can find are:

Pavey v. Utter, 132 Ill. 438.

The court says, p. 491: "But if the two acts are so inconsistent that they cannot stand together, the later act must prevail," upholding *Devine v. Commissioners*, 84 Ill. 590, and *Culver v. Third National Bank*, 64 Ill. 528; also in *Kepley v. The People*, 123 Ill. 367, the court said: "If two inconsistent acts be passed at different times, the last is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way." Also, in case of *Illinois & Michigan Canal v. City of Chicago*, 14 Ill. 334, the court said: "If two statutes are clearly repugnant to each other, the one last enacted operates as a repeal of the former."

That court said also, on p. 336, "a subsequent statute, revising the whole subject of a former one, and intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former."

Citing:

Bartlett v. King, 12 Mass. 537.

Towle v. Manett, 3 Greenleaf, 22.

Nichols v. Squire, 5 Pick. 168.

Pulaski County v. Downer, 5 English 588.

To the same effect (and it is unnecessary to quote from them):

Moore v. Moss, 14 Ill. 106.

Dingman v. People, 51 Ill. 277.

Maher v. City of Chicago, 33 Ill. 267.

From the foregoing line of authorities, I think it is the law, that when the last ordinance contains the latest expression of the City Council's will, the last ordinance must prevail.

Therefore, I am of the opinion that the ordinance of July 18, 1895, repeals the ordinance of March 8, 1895, and establishes the curb-lines of 70th street at 38 feet in width.

I recommend that the contractor be permitted to proceed with his contract for the 38-foot roadway, under the ordinance of July 18, 1895.

Yours truly,

LAWRENCE A YOUNG,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

OCTOBER 12, 1897.

MR. JOSEPH S. MARTIN, City Collector.

Dear Sir:

I beg leave to submit herewith my opinion with relation to the validity of an ordinance, amending an ordinance concerning lumber yard, passed March 5, 1883, which reads as follows:

Sec. 1. "No person, firm or corporation shall follow the business or occupation of dealing in lumber, or keep or maintain any lumber yard, or place for the sale of lumber, or transact business as a factor or broker of lumber, without a license therefor."

Sec. 2. "A license shall be granted to any person, firm or corporation, to follow the business or occupation of a dealer in lumber upon the payment to the city of the sum of one hundred dollars per annum."

Sec. 3. "Any person, firm or corporation who violates any of the provisions of this ordinance shall be fined not more than one hundred dollars for each offense."

The original ordinance to which this is an amendment was passed under the power delegated to the city, by virtue of Sec. 91, Art. 5, Ch. 24, Starr & Curtis, and known as the General Act for the Incorporation of Cities and Villages. Said section is as follows:

"City Councils shall have the power to tax, license and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers and brokers."

This section of the statute has been passed on many times by the courts, and there is no doubt as to the power of the legislature to delegate this power to the City Council.

Wiggins Ferry Co. v. E. St. Louis, 102 Ill. 560.

The only question is, does this ordinance exceed the power contained in this section? As the Supreme Court said in *Wheeler v. Wayne County*, 132 Ill. 599, that "neither the corporation nor its officers can do any act not authorized by the charter, or its organic act," and "any doubt is resolved against the corporation."

Seeger v. Mullin, 133 Ill. 86.

The two words "lumber yards" and "brokers" contained in this section are the ones upon which the ordinance must rest.

This ordinance uses the words "factors or brokers of lumber." A broker is "one who is engaged for others in negotiating contracts relative to property with the custody of which he has no concern."

"A factor is one who sells property of others when he has its possession."

Braun v. City of Chicago, 110 Ill. 195.

In *Howland v. City of Chicago*, 108 Ill. 501, the Supreme Court said: "It is plain to us that this whole section relates to occupations and means by the terms "lumber yards", etc., "keepers or owners of lumber yards", etc. Consequently a "factor" would necessarily be construed as the "keeper of a lumber yard."

It is my opinion the City has the power to collect a license under this ordinance.

I would make the suggestion that the words "as afore-said" be inserted in Section 2, after the word "occupation," in lieu of the words "of a dealer in lumber." This would make the section more certain and eliminate a certain vagueness therein contained.

Respectfully,

DENIS E. SULLIVAN,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

OCTOBER 13, 1897.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

In answer to your request for an opinion showing by what authority the various street railway companies of Chicago are now occupied in hauling freight and United States mail over their respective lines, I beg leave to report, that the cable and electric lines in the City of Chicago are transporting the United States mails and carrying postal cars for the distribution of the same by order of the Postmaster General, who is authorized by statute to establish mail routes on all railroads or parts of railroads, steamboats and public highways. Section 3964 of the United States Revised Statutes relating thereto, is as follows:

“The following are established post roads:

All the waters of the United States, during the time the mail is carried thereon.

All railroads or parts of railroads which are now or hereafter may be in operation.

All canals during the time the mail is carried thereon.

All plank roads during the time the mail is carried thereon.

The road on which the mail is carried to supply any court house which may be without a mail, and the road on which the mail is carried under contract made by the Postmaster General for extending the line of posts to supply mails to postoffices not on any established route, during the time said mail is carried thereon.

All letter carrier routes established in any city or town for the collection and delivery of mail matters.”

Congress by an act approved June 9, 1896, made an appropriation of \$150,000 for the fiscal year ending June 30, 1897, for the transportation of mail by electric and cable cars on routes not exceeding twenty miles in length. Congress by an act approved March 3, 1897, made appropriation for the fiscal year beginning July 1, 1897, for similar service. General Louis R. Troy, President of Railway and Mail Service in Chicago, was directed by the Postmaster General in the latter part of 1895, to establish the street railway mail

service in this city, and under direction of the Postmaster General he is now maintaining the system and has arranged with the street railways to run a mail car at regular intervals over each of the lines they are now operating, but I find that the ordinance authorizing the construction and operation of certain horse railways in the streets of the City of Chicago, passed August 16, 1858, contains the provision that "the said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage."

The act of the Legislature of Illinois, approved February 14, 1859, to promote the construction of horse railways in the City of Chicago provides, "that the said corporation is hereby authorized to construct, maintain and operate a single or double track railway . . . in the City of Chicago in such streets as the City Council of said city shall have authorized said corporators, or shall authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges as the said City Council has, or may, by contract with said parties, or any or either of them, prescribe."

In the ordinance of the City Council of the City of Chicago passed May 23, 1859, authorizing the extension and operation of certain horse railways in the streets of the South and West Divisions of Chicago there is a similar inhibition against the use of the tracks and railways for any other purpose than to transport passengers.

By ordinance passed May 23, 1859, authorizing the construction and operation of horse railways in the North Division of the City of Chicago there is a similar provision that said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage.

In the ordinance of the City Council of Chicago, subsequently passed, no additional privileges with relation to their power to carry other than passengers are given.

I fail to find anywhere any revocation of the requirement that the street car companies shall carry only passengers. No permission ever seems to have been granted by the City Council permitting the street car companies, or any of them, to carry mail. The prohibition against carry-

ing anything but passengers is in full force, and it is my opinion therefore that the street railway companies at present are carrying United States mail and running cars for the accommodation of the mails over their several routes not only without any authority whatever but in direct opposition to the provisions of the original grants to the railway companies. Of course, the mere authorization by the United States authorities is not sufficient to entitle the street railway companies to carry mail against the express provisions of the several ordinances under which they are operating.

Very truly yours,

CHAS. S. THORNTON,

Corporation Counsel.

OCTOBER 28, 1898.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have examined into the matter of the right of the Illinois Central Railroad Company to fill a tract of land partially submerged east of the right of way of the Illinois Central Railroad Company and between the lines of 25th and 27th streets extended, and I am of the opinion that the Illinois Central Railroad Company has not the right to fill said space.

Prior to 1894, the company was permitted to construct a breakwater 780 feet long from north to south, 500 feet at its north end, and 300 feet at its south extremity, distant from the shore line. The company now claims as a right the privilege to fill the intermediate space, about 7.162 acres in extent, for the purpose of constructing a round house and laying tracks thereto upon the surface of the ground so made. The railroad company bases its claim to do this upon two grounds.

1st. Because it is the riparian owner in fee of the shore land.

2d. Because Section 3 of its charter confers that power. That section of the charter reads as follows:

“The said corporation shall have right of way upon, and appropriate to its sole use and control for the purposes

contemplated herein land not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said railroad. All such lands, waters, materials and privileges belonging to the State are hereby granted the said corporation for said purposes."

Private Laws, Ill., 1851, pages 61, 62.

As to the first contention it has been clearly established that an owner of shore land who possesses riparian privileges has the right to accretions resulting from the action of the waters which wash the shore, and possesses the privilege of constructing piers or wharfs in aid of navigation. These wharfs or piers, however, must be in the interest and for the benefit of the general public, and must not extend beyond the line which will result in impeding navigation.

Getty v. Hudson R. R. Co., 21 Barb. (N. Y.) 628.

As to the second contention if the same should be acceded to by the City of Chicago the railroad company would be entitled to line the entire shore from 16th street to 51st street with its workshops, to fill in the shallow water wherever it possessed riparian rights, and I understand that it owns them over all this stretch of shore.

The adoption of a fixed policy, therefore, by the City of Chicago with reference to the shore line between the points named is one of great importance. I have carefully considered the case of *Illinois Central Railroad Company v. Illinois*, 146 U. S., page 387, wherein it is claimed by the company that the Supreme Court of the United States has given it the same rights for which they are now contending so far as they relate to the shore line between 13th and 16th streets. I think, however, that the decision will not uphold the claim. In that case the court held that the piers were extended in aid of navigation and for the benefit of the public. In this case it must be admitted that the land to be

improved by the company is for its sole use and that the public will have no interest whatever therein. It is not in aid of public commercial interests; it is not built for the purpose of enabling citizens to pass over the shoal to the deeper waters of the lake; it is not constructed for a landing place for steamers, and while it may not be considered that the eastern limits of the breakwater impedes navigation, yet it cannot be considered that it is of any assistance in that direction. There are many decisions supporting this principle, among them the following:

Hardin v. Jordan, 140 U. S. 371, 381.

Manchester v. Massachusetts, 139 U. S. 240, 262.

Deidrich v. The N. W. Ry. Co., 42 Wis. 248, 266.

Farist Steel Co. v. Bridgeport, 60 Conn. 278.

As to the jurisdiction of the United States, of the State of Illinois, and the City of Chicago, respectively, I have to say, that the general government has power to control the interests of navigation, to remove and prevent the construction of anything that may be an impediment thereto from the shore to a line between Michigan and Illinois. The railroad company has received a permit from the War Department allowing the construction of this "pier" if seven acres and more of newly made land may be so denominated. Of course, such permit indicates nothing more than that the proposed structure does not in view of the general government obstruct the navigable waters. It is not a conveyance of the submerged lands to the company nor of the space occupied by the waters resting thereon, but is simply an expression upon the part of the United States that it does not consider that navigation will be impeded by the construction of the pier by the railroad company.

The State of Illinois is the owner, in trust, however, for the people, of the submerged lands from the shore to a line between the two States already named. The State has the power to grant, but all conveyances of submerged lands must be made in the interest of the people for the purpose of assisting navigation of the lake or in the enjoyment by the people of its waters. A grant by the State for any other purpose is in my opinion ultra vires and therefore void.

The City of Chicago has been awarded by the State of Illinois the control of the waters of the lake for a distance of three miles east of the shore line for the enforcement of police and health regulations. For the purpose of preventing the pollution of the lake waters the City of Chicago is given jurisdiction also over the waters of the lake to a distance of ten miles from the shore. Within the exercise of its powers the City Council of Chicago has passed the following ordinance:

“793. PILE DRIVING—ENCROACHMENT OF HARBOR LINES.

—No person or persons shall drive or place, or cause to be driven or placed, any pile or piles, stone, timbers, earth or other obstruction in the harbor of the city without permission of the Commissioner of Public Works, nor shall any person or company use the piers of the harbor erected by the government of the United States without the permission of the agent of the United States for said piers or the harbor master. It shall be the duty of the harbor master to report to the City Engineer any and all encroachments upon the harbor lines as now established or which may be hereafter established and thereupon they shall take such action as may be necessary to enforce the provisions of this chapter.”

I am of the opinion, therefore, that the United States government has conferred by its permit to the Illinois Central Railroad Company no substantial rights to construct the pier referred to; that the State of Illinois by Section three of the charter granted the railroad company has given the latter no power whatever to build that which is of no value to the public either in the enjoyment or in the mercantile use of the waters of the lake; that the powers given by the charter should be strictly construed and that the interpretation placed upon Section three by the railroad company is too broad; that the City of Chicago has power to restrain the erection of the pier if it so desires, but has no power, so far as I am able to discern, to confer upon the railroad company the right to fill in any portion of the lake.

Very respectfully,

CHAS. S. THORNTON,

Corporation Counsel.

OCTOBER 30, 1897.

MR. R. A. WALLER, Mayor, Pro Tem.

Dear Sir:

At your request I have looked into the law concerning the fees received by Police Magistrates, daily, after 6 p. m., and have the honor to report:

That Section 1545 of the Revised Code of Chicago, provides that Justices of the Peace acting as Police Magistrates by the authority of the city *shall receive a salary to be fixed by the City Council in lieu of all other compensation*, and must sign contract to that effect to be filed in the Comptroller's office before they enter upon their duties; that they shall devote their whole time to their duties as such magistrate and shall account for and turn over to the City of Chicago all moneys received by them for the issuing of all writs and processes, the making of all orders, the approval of all bonds and all moneys received by them for any duty or act performed by them as such Police Magistrate—on penalty of removal from office.

In my opinion any agreement entered into between any head of a department and such Police Magistrate providing other and different disposal of any portion of the said moneys received by said Police Magistrate is in contravention of the ordinance, and is null and void.

Upon inquiry I am informed that no such contract is in existence at the present time, and that the custom of Police Magistrates retaining for themselves the court fees received after 6 p. m. exists by force of mere usage, and is contrary to the ordinance.

Yours respectfully,

HOWARD S. TAYLOR,

Prosecuting Attorney.

I fully concur in the above and foregoing opinion of Mr. Taylor, the Prosecuting Attorney.

Respectfully yours,

CHAS. S. THORNTON,

Corporation Counsel.

NOVEMBER 3, 1897.

MR. WM. HURIN, Secrétary, Board Examining Engineers.

Dear Sir:

Replying to your letter of the 2d inst., asking whether the ordinance governing the licensing of engineers can be legally amended so as to include engineers operating steam dredges and pile drivers on the river:

I call your attention to the 30th Sub. of Par. 63, Art. 5, Chap. 24, Starr & Curtis, Powers of City Council, as follows:

"To deepen, widen, dock, cover, wall, alter or change channel of water courses."

I also call your attention to Par. 72, of Art. 6, of Chap. 15, 24, Starr & Curtis, as follows:

"Jurisdiction over Waters—Street Labor.

"The city or village government shall have jurisdiction upon all waters within or bordering on the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the State. . . ."

I am therefore of the opinion that all those engineers operating steam dredges and pile drivers on the Chicago River and its branches within the limits noted in said Par. 72 under the authority and direction of the City of Chicago can be required to obtain licenses therefor from the city under the present ordinance.

So that an amendment such as is suggested by you, would simply serve to make your authority as a licensing board more specific and more easily interpreted.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

NOVEMBER 6, 1897.

MR. JOSEPH S. MARTIN, City Collector.

Dear Sir:

I have your favor of November 2, 1897, addressed to this

department, asking if you could issue a license under Section 1194, "Revised Code", to beer peddlers and grocers, to sell beer, liquors, etc., in the local option and prohibition district of Lake View, Town of Lake and Hyde Park. In reply, I beg to say that Section 1194 of the "Revised Code" is not applicable to these districts.

Section 235 of "Cities and Villages", Starr & Curtis' Statutes, Chap. 24, which was in force at the time these districts were annexed to the City of Chicago, reads as follows:

"When a part or the whole of an incorporated town, village or city is annexed, under the provisions of this act, to another city, village or incorporated town, and prior to such annexation an ordinance was in force prohibiting the issuing of licenses, to keep dram shops within said territory so annexed, or any part thereof, or, providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dram shops, then such ordinance shall continue in full force and effect, notwithstanding such annexation," etc.

This section has been sustained in the case of *The People, ex rel v. Cregier*, 138 Ill. Reports 401.

Consequently the ordinances in force in these districts prior to annexation are paramount and must control.

There can be no question as to the certainty of the prohibition in Lake View or the Town of Lake. The first section of the Lake View ordinance passed June 27, 1889, reads as follows:

"No license shall at any time hereafter be granted to any person or persons to keep a saloon, dram shop or other place for the sale, exchange, giving away or barter of any kind of alcoholic drinks."

Section 22 of Chap. LVII of the Revised Ordinances of the Town of Lake makes the prohibition fully as absolute. It reads as follows:

"No license shall be granted to any person to carry on the business of a wholesale liquor dealer within the districts where, by ordinance, saloons or dram shops are now or may hereafter be prohibited."

Section 19 of this chapter defines a "wholesale liquor

dealer" as one who "sells intoxicating liquors in quantities not less than a gallon at one time."

I am free to confess that the ordinance, Chap. XV, "Revised Municipal Code, 1887", with relation to the Hyde Park district does not dispose of the question with the clearness I would wish.

No license is required for quantities over four gallons and it divides the business of liquor selling into two classes, viz: "Saloons and dram shops", Section 2, and a "liquor or beer wagon", Section 4.

Section 10 of this ordinance disposes of the question of issuing a license for a fee of fifty (50) dollars. It reads as follows:

"No person shall receive a license to keep or maintain a dram shop, saloon, or liquor or beer wagon, within the limits of the Village of Hyde Park, except upon the payment in advance to the Comptroller of the Village to be by him paid into the village treasury of a sum at the rate of five hundred (500) dollars per annum for each dram shop, saloon, liquor or beer wagon."

It may occur to you that this section refers only to the two classes described in Sections 2 and 4, viz:

"Dram shops and saloons", and "liquor and beer wagons", and does not include grocers, etc.

You will notice that Section 9 of the act in prescribing what conditions must be complied with before the license issues, uses the following language:

"No person shall be licensed to keep a saloon, dram shop or liquor or beer wagon, *or sell intoxicating liquor* without first giving bond," etc.

And this being followed by Section 10 it is reasonable to infer that the classes mentioned in Section 9 would be included in Section 10, which would necessarily mean grocers.

You will notice that Section 6 of this ordinance reads:

"The President and Board of Trustees by resolution may grant licenses to keep so many dram shops, saloons or beer wagons in the Village of Hyde Park *outside of the prohibition district* as they think the public good require."

Construing this whole ordinance together with special ref-

erence to Sections 2, 4, 6, 9, 10 and 21, I have come to the following conclusion: That within the prohibition district of Hyde Park, it was intended that no license should be issued; that outside of the prohibition district the license fee of five hundred (500) dollars, should be demanded for selling any amount less than four gallons; that Section 1194 of the new Revised Code of Chicago has no application and you should refuse licenses thereunder in any of these districts.

Respectfully,

DENIS E. SULLIVAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

NOVEMBER 13, 1897.

TO THE HONORABLE, THE FINANCE COMMITTEE OF THE CITY
COUNCIL.

Gentlemen:

In reference to the validity of all claims for alleged damages sustained by owners of buildings on the West and North Sides of the city by jarring or concussion resulting from dynamite explosions for the blasting of rock in the process of constructing one of the sections of the water tunnel some seventy-five or one hundred feet beneath the street surface submitted by you for my opinion, I have to report, that such claims against the city cannot be supported in the courts, for the reason that the section of the water tunnel under the city wherein the explosions have occurred, and which are assumed to be the cause of the damage to the several pieces of property referred to by you, is being constructed by independent contractors, over whose work the city has no control or supervision, save that of the right of inspection to the end of a full compliance with the contract. Hence the relation of master and servant does not exist between the city and them, and the rule of *respondeat superior* does not apply. Under these circumstances the city is not liable for any of the results of negligence on the part of the contractors in doing this work. Such is the basis of the demand referred

to, and hence cannot be justly considered by the city. The authorities in support of this position are numerous, and among which may be named: *Carey v. City of Chicago*, 60 App. 341, 343; *Fitzpatrick v. C. & W. I. R. R. Co.*, 31 App. 649, 650; *Hale v. Johnson*, 80 Ill. 185, 186-7; *Scammon v. City*, 25 Ill. 361, 368-9; *City of E. St. Louis v. Giblin*, 3 App. 222; *Arasmith v. Temple*, 11 App. 39, 48-9; *C. C. Ry. Co. v. Hennessy*, 16 App. 153-5-7-9.

Respectfully submitted,

THOS. J. SUTHERLAND,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

NOVEMBER 15, 1897.

MR. R. A. WALLER, Comptroller.

Dear Sir:

There is in my opinion no conflict between Secs. 1940 and 1941 of the Revised Code of Chicago; the former section states the duties of the Inspector of Steam Boilers, requiring a careful examination with subjection to hydrostatic pressure, etc., of "All boilers used for the generation of steam power, or for heating or steaming purposes except in private residences, and all tanks subjected to steam pressure used in any business;" the latter section makes it unlawful for "Any person to use any steam boiler or any tank or tanks subject to steam pressure in this city until he shall have procured a certificate from the inspector that it may be safely used; and it is made the duty of every person using steam boilers or any tank or tanks subject to steam pressure in this city to have the same inspected by the Inspector of Steam Boilers as often as once in each and every year thereafter; and to that end, every owner or person using a steam boiler or tank aforesaid shall make or cause to be made, annually after such first inspection an application in writing to the inspector requesting him to inspect the same. Section 1942 prescribes the form and substance of the certificate to be issued by the inspector.

It is none the less the duty of the inspector to examine appliances in private residences because of the exception in Section 1940; but he need not do it with the degree of care prescribed in that section; he is to furnish a certificate in the first instance that it may be safely used, specifying the particulars as mentioned in Section 1942 in all cases.

The City Council makes no exception in Sec. 1941; I do not see how the inspector or other city authorities can do so.

Respectfully yours,

CHAS. S. THORNTON,
Corporation Counsel.

NOVEMBER 16, 1897.

HON. CARTER H. HARRISON, Mayor of Chicago.

Dear Sir:

Replying to your question as to what duties are incumbent upon the city to light the boulevards, I beg to say that after a careful investigation I find there are no reservations touching this subject in the various ordinances passed by the City Council ceding the boulevards to the several Park Boards.

We must therefore refer to the statutes creating the Park Boards to see what powers the Legislature intended they should assume.

Section 54, Chapter 105, Starr & Curtis, in relation to parks, gives the city the right to cede these streets to the Park Commissioners; it reads as follows:

“Any city, town or village in this State, shall have full power and authority to invest any of such Park Boards with the right to control, improve and maintain any of the streets of such city, town or village, for the purpose of carrying out the provisions of this act.”

Section 41 of said chapter, gives to the Park Commissioners power to select and locate a system of boulevards to connect the various parks, so as to form a continuous improvement, and to acquire title to lands which may be necessary to make such connection, etc.; said section further says that such boulevard or pleasure way shall be under the con-

trol and management of such Park Commissioners the same as *other* public grounds by them established.

We see by these two sections that it was the intention of the Legislature to have a system of boulevards in the City of Chicago to *connect* the various parks, and that the whole thereof should be under the control of the Park Board.

In order to connect the various parks the boulevards must be continuous, and it would defeat the very purpose of the boulevard system if at every street intersection the continuity be broken and the city intervene.

In passing on this subject of the control of the parks and boulevards and the power of the Park Commissioners, the Supreme Court said in the case of *McCormick v. South Park Commissioners*, 150 Ill. Rep. 516, that:

"The power of the Commissioners over the parks, boulevards and driveways under their control, being identical in extent with that vested in the Common Council over the public squares and places of the city, such Park Commissioners, in respect of streets acquired by them under this act, are to exercise the same power and dominion."

In the case of *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 393, Mr. Justice Bailey in delivering the opinion of the court, used the following language:

"It follows that the power of the Park Board over all these parks, boulevards and streets, for the purposes prescribed by these statutes is plenary, while that of the city is *wholly excluded*. And this exclusion, so far as it relates to any power on the part of the city to govern, manage, control or interfere with these parks, boulevards and streets as such, is as complete as it would have been if the parks, boulevards and streets had been wholly withdrawn from the territorial limits of the city. Indeed, the legal effect of the various park acts would seem to be to take them out of the territorial jurisdiction of the city, so that, so far as the power of the city in relation to them is concerned, the corporate organization of the city is practically dissolved."

Again, continuing, he says:

"So far then, as relates to all questions of street improvements, the West Chicago parks are no more to be considered

as a part of the City of Chicago than they would be if they were situated within the adjoining City of Evanston."

In light of these several sections of the statute and decisions thereunder, I have come to the following conclusions: That the various park boards have the same jurisdiction over the boulevards as they have of the parks; that the city has no right or part in the management, control or maintenance of any boulevard within its limits; that the boulevard system is a continuous connection between the various parks; that at street intersections certain rights are reserved to the city but I am of the opinion that it is the duty of the Park Boards and not that of the city, to furnish light for the boulevards throughout their entire length.

Respectfully,

DENIS E. SULLIVAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

NOVEMBER 18, 1897.

CHARLES M. WALKER, Esq., Chairman of the Judiciary Committee of the City Council of the City of Chicago.

Dear Sir:

In accordance with your request of the 16th inst., I have examined the law regarding the power of the several companies operating the parts of the elevated roads known as the "Union Loop", to construct passageways, bridges, platforms or other structures over the streets and sidewalks of the city connecting their right of way or depot platforms with the buildings of private parties adjacent thereto.

The City of Chicago holds the title to the streets and sidewalks of the city in fee, as trustee for the use and enjoyment of the public.

This title includes not only the surface of the streets and sidewalks, but also the column of light and air above them.

An ordinance granting any part of the surface of the street for a private purpose would be *ultra vires*, and one

attempting to dispose of the light and air above the street for a similar purpose is equally so.

Field, et al., v. Barling, et al., 149 Ill. 556.

I therefore find that the elevated roads have no authority to erect such private bridges and passageways under their ordinances. Because the city holds the streets and sidewalks in trust for the public, even if the elevated roads had a valid right to construct these private bridges and passageways under their ordinances, all such orders and ordinances are mere revocable licenses.

Hibbard, Spencer Bartlett & Co. v. The City of Chicago, 59 Ill. App., page 470.

The order, therefore, to be passed by the City Council, ordering the immediate removal of all such structures, is perfectly legal and within the power of the City Council, and binding upon all parties in interest.

Yours respectfully,

GRANVILLE W. BROWNING,

Assistant Corporation Counsel.

NOVEMBER 18, 1897.

MR. ROBERT A. WALLER, Comptroller.

Dear Sir:

I have your favor of November 18, 1897, addressed to this department, in which you ask if the City of Chicago has the right to issue bonds under the ordinance of October 25, 1897, payable in *either* New York or Chicago.

You refer us to Section 2428 of the Revised Code of Chicago, which gives the city power to issue bonds. You also refer us to Section 38, Chap. 5, of the old City Charter, which provides that bonds shall be issued payable in the City of New York.

The question which you wish determined, as I understand it, is whether or not the provision in Section 38, of Chap. 5, of the old charter which makes the bonds payable in the City of New York meant that the bonds should be payable *only* in the City of New York.

In reply I beg to say that in the absence of the special power granted in Section 38 of the old charter all bonds and

obligations issued would be payable only at the treasury of the municipality in the City of Chicago, the doctrine of this State being that there must be special legislative action giving power to make obligations of municipalities payable at a place out of the State.

In the case of *The People, ex rel. v. The County of Tazewell*, 22 Ill., 147, Mr. Justice Walker said:

"States, counties and corporations, created for public convenience only, are not required to seek their creditors to discharge their indebtedness, but when payment is desired, the demand should be made at their treasury. That is the only place, at which payment can be legally insisted upon, and it is the only place where the treasurer can legally have the public funds with which he is entrusted. To authorize the auditor to draw his warrants on the treasurer, payable in a sister State, or in a foreign country, necessarily imposes an obligation on the treasurer, to provide funds at that place, to meet them. And his duties requiring him at the treasury would require the employment of agents, the transmission of the fund at a risk of loss and at a considerable expense, in charges, insurance and discounts, which are not incident to its payment at the treasury. And the same reasons apply with equal force, to cities, counties and public corporations, of a similar character. The Legislature has conferred no such general power on such bodies, and in its absence they have no power to make their indebtedness payable at any other place, than at their treasury."

This doctrine was further affirmed in *Johnson v. Stark County*, 24 Ill. 91. *Pekin v. Reynolds*, 31 Ill. 530. *Sherlock v. The City of Winnetka*, 68 Ill. 530.

In light of these various decisions, I am of the opinion that bonds issued under the ordinance of October 25, 1897, payable in either New York or Chicago, would be legal.

Yours truly,

DENIS E. SULLIVAN,

Assistant Corporation Counsel.

Approved:

GRANVILLE W. BROWNING,

Asst. Corporation Counsel.

NOVEMBER 20, 1897.

MR. R. A. WALLER, City Comptroller.

Dear Sir:

Relative to issuance and paying out or delivery of vouchers for contract work for the city with the words written across the face of each: "To be paid when council appropriates the money", it is my opinion that such vouchers have no validity in law, whatever.

The City Charter (Rev. Code, Sec. 2254) prescribes as follows: "Sec. 4. No contract shall be hereafter made by the City Council or Board of Trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the City Council or Board of Trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

Section 208 of the Criminal Code (Hurd, R. S., p. 543) is as follows:

"208. Every person holding any public office (whether State, county or municipal), trust or employment, who shall be guilty of any palpable omission of duty, or who shall be guilty of diverting any public money from the use or purpose for which it may have been appropriated or set apart by or under authority of law, or who shall be guilty of contracting directly or indirectly, for the expenditure of a greater sum or amount of money than may have been, at the time of making the contracts, appropriated or set apart by law or authorized by law to be contracted for or expended upon the subject matter of the contracts, or who shall be guilty of wilful and corrupt oppression, malfeasance or partiality, where no special provision shall have been made for the punishment thereof, shall be fined not exceeding \$10, and may be removed from his office, trust or employment.

Issuing such vouchers out of your office or through it brings you, I think, under the ban of these statutes.

Respectfully yours,

CHAS. S. THORNTON,

Corporation Counsel.

NOVEMBER 26, 1897.

MR. JOHN POWERS, Chairman Finance Committee.

Dear Sir:

In reference to your communication of November 19, 1897, regarding the proposition of the Hayes and Johnston heirs to quit-claim to the city part of the land now occupied as Union Park, I report as follows:

1st. The part of the park conveyed by S. S. Hayes and W. S. Johnston, Jr., pursuant to the ordinance of January 9, 1854, consisted of the west 10 974-1,000 acres only of the said park; the east portion of the park was derived through other grantors. So far as the ordinance of January 9, 1854, is concerned, standing alone, the city would own the land concerned absolutely in fee simple title. The recitals of the deed executed and delivered by Hayes and Johnston would govern as to the title of the city. It appears that all the records thereof were destroyed in the great fire of 1871. The Hayes and Johnston heirs, however, claim that that deed contained a provision that the land conveyed thereby was conveyed upon condition, to be used exclusively as a park forever; that if the city should ever use it for any other purpose, the land thereby conveyed should revert to the heirs of the grantors. In pursuance of this they have offered an affirmation and affidavit by Ferdinando Jones, Esq., and W. K. Nixon, Esq., to that effect. Handy & Co. have no minutes in their office casting any light on the subject.

In my opinion, the Hayes and Johnston heirs could, in a burnt record proceeding, secure a decree to the effect that the deed was a deed upon condition, with reversionary clause, as they claim. If that be true, the City of Chicago would have to obtain a quit-claim deed of the heirs of Hayes and Johnston, Jr., in order to use the ground conveyed by the old deed for any other purpose than a park.

2. A quit claim deed from the heirs of Hayes and Johnston, together with the consent of the property owners adjoining, would enable the city to use Union Park as it pleased, whether as a park or otherwise.

3. The ordinance turning over the control of Union Park

to the West Park Commissioners can be rescinded at any time by the city.

I have not examined into the question as to whether the city would have to make compensation for the moneys heretofore expended by the Park Commissioners in improving the park.

Respectfully submitted,
 GRANVILLE W. BROWNING,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

NOVEMBER 27, 1897.

MR. E. B. ELLICOTT, Supt. of City Telegraph.

Dear Sir:

The Corporation Counsel has referred to me for investigation the questions submitted in your letter of the 22d inst., relative to the enforcement of Sections 1902 to 1906 inclusive, of the Revised Code of Chicago (1897) against telegraph, telephone and electric light companies, whose franchises were granted by towns outside the City of Chicago, and since made a part of this city by annexation.

In reply will say that when these towns or districts were annexed to Chicago they became a part thereof, and subject to the operation of all valid and existing police ordinances then in force, or thereafter passed. You state that several of these companies have refused to comply with the terms of the Revised Code above quoted, requiring the doing of a certain amount of underground work each year, and that such refusal is based upon the claim that their franchises were granted by towns or districts not then a part of the city.

Such a claim is absolutely worthless. The ordinance requiring telegraph, telephone and electric light companies to remove a certain number of poles and place a certain amount of wire underground each year is essentially a police regulation, and as such is capable of enforcement no matter what

the provisions of the ordinances were at the time these recalcitrant companies were granted franchises.

It is indisputably a fact that poles laden with wires, erected in the public thoroughfares of a great city are not only unsightly but are also a menace to public safety, and it most certainly is a reasonable exercise of the police power granted the City Council for the preservation of life, liberty and property to require that this antiquated and unsafe method of construction be gradually abolished, and the wires put underground out of harm's way.

Clause 17 of Article V. Ch. 24, Starr & Curtis, entitled "Powers of City Council," gives the Council the right:

"To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awning, awning posts, *telegraph poles*," etc., and clauses nine and ten, same article and chapter, invest the City Council with full power to regulate the use of streets and to "prevent and remove encroachments or obstructions upon the same."

There is no doubt, in my mind, as to the ability and legal right of the City to enforce the provisions of the ordinance requiring the removal of "two miles of poles from the streets, alleys or public grounds," each year, and the placing of the wires therefrom in underground conduits.

In reply to your question, whether when these obstinate companies in the annexed districts apply for permits to erect poles, and place wires thereon, you can refuse to grant same until they have complied with the underground ordinance, will say that such a course of procedure on your part would be eminently proper. You should refuse on the ground that they being already violators of the city ordinance, a permit will not be issued by you as a city official to allow a still further violation, and to further encumber the streets of the city with a system of construction regarded as unsafe and which creates a nuisance.

Permits for pole construction are now issued merely as a convenience, and to allow the companies an opportunity to conform to the provisions of the underground ordinance,

without too great embarrassment in the carrying on of their business.

Very truly yours,
WM. H. ARTHUR,
Assistant Corporation Counsel.

Approved:
CHAS. S. THORNTON,
Corporation Counsel.

NOVEMBER 27, 1897.

TO THE HONORABLE, THE FINANCE COMMITTEE OF THE CITY
COUNCIL.

Gentlemen:

As there seems to be some misunderstanding with reference to the opinions sent to your Committee relative to the claim of the heirs of Messrs. Hayes and Johnston to Union Park, I beg to call your attention again to said opinions, and to say that so far as the public records disclose, and so far as is indicated by the records of abstract firms, the said heirs have no claim whatever to any portion of Union Park. So far as the records disclose they have not a dollar's worth of interest in said premises. They make a claim, however, which, if substantiated, would, of course, give them a valuable interest in a part of the property, provided the city wished to use it for any other purpose than that of a public park. Whether they could substantiate their claim in the courts is a very doubtful question. Until such action, however, has been taken by them, and the rights which they claim have been made matters of record by a court of proper jurisdiction, the heirs have absolutely nothing whatever of value to sell to the city, and there is nothing upon which to base a purchase by the city. Although this position is asserted in the opinions heretofore sent your Committee, and will be found to coincide with the statements therein contained, yet inquiries made by those interested in the decision have indicated to me that it would be wise to reassert the same, and to say that a purchase of this property by the city would not be justified under existing conditions.

Very truly yours,
CHAS. S. THORNTON,
Corporation Counsel.

DECEMBER 4, 1897.

MR. JOSEPH S. MARTIN, City Collector.

Dear Sir:

Your request to this department for an opinion as to whether the City Collector could return to the County Collector in 1898, the lots, pieces and parcels of land found delinquent in different special assessments even as far back as 1892, received, and in reply let me quote Par. 167, Ch. 24, Art. 9, General Act for Incorporation of Cities and Villages, Statutes of Illinois, Starr & Curtis' Edition, 1896, which is as follows:

"All special assessments levied by any city or village under this act, shall, from the date of the assessment, be a lien upon the real estate upon which the same may be imposed, and such lien shall continue until such special assessments are paid. And the same proceedings may be resorted to by the collector, upon any warrant or order issued or made for the collection of special assessments, as in the case of the collection of State and county taxes under the general laws of the State."

And Par. 281, Ch. 120 (Revenue Act), S. & C., Statutes of Illinois, which is as follows:

"When any special assessment is not returned to the County Collector on or before the first day of March next after it is due, the same may be returned on or before the first day of March in the succeeding year; and, if not returned, it shall be considered barred, unless return is prevented by an injunction or order of court; and the time such return is thus prevented shall be excluded from the computation of such time."

And this Par. 281 being a limitation on Par. 180 of the Revenue Act, which requires County Collectors to collect and account for special assessments when returned to them unpaid, applies to municipalities making assessments under special charter power, and not to municipalities making assessments under "General Incorporation Act", etc., Ch. 24, Art. 9, under which the City of Chicago is incorporated.

The People, ex rel., Louis C. Huck, Collector v. J. Irving Pierce, et al., 90 Ill., p. 85.

People, etc., v. Springer, 106 Ill. 542.

These paragraphs are incompatible with Par. 155 of the General Incorporation Act, Ch. 24, Art. 9, which is as follows:

“It shall be the duty of the collector of special assessments, within such time as the City Council or Board of Trustees may by ordinance provide, to make a report in writing to the general officer of the county authorized, or to be designated by the General Revenue Law of this State, to apply for judgment and sell lands for taxes due the county and State, of all the lands, town lots and real property on which he shall have been unable to collect special assessments, with the amount of special assessments due and unpaid thereon, together with his warrant, or with a brief description of the nature of the warrant or warrants received by him authorizing the collection thereof; which report shall be accompanied with the oath of the collector that the list is a correct return and report of the lands, town lots and real property on which the special assessments levied by authority of the city of (or village of, as the case may be), remain due and unpaid; that he is unable to collect the same or any part thereof, and that he has given the notice required by law that said warrants had been received by him for collection.”

And such time has been fixed by ordinance of the City Council. (Code 1897, Ch. IV, Art. IV, Sec. 71.)

And from the reasoning employed by the Supreme Court in *The People, ex rel., S. H. McCrea v. G. D. Atchison, et al.*, 95 Ill. 452, in which the question was the meaning and construction of the limitation of five years in the Park Law, 1869, with reference to special assessments, which was exactly the same as the language in Par. 164 of the General Incorporation Act, Ch. 24, Art. 9, S. & C. Statutes of Illinois, which is as follows:

“If, from any cause, any city or village shall fail to collect the whole or any portion of any special assessment which may be levied, which shall not be canceled or set aside by the order of any court, for any public improvement authorized to be made and paid

for by special assessment, the City Council or Board of Trustees may, at any time within five years after the confirmation of the original assessment, direct a new assessment to be made upon the delinquent property for the amount of such deficiency, and interest thereon from the date of such original assessment, which assessment shall be made, as near as may be, in the same manner as is herein prescribed for the first assessment. In all cases where partial payment shall have been made on such former assessment, they shall be credited or allowed on the new assessment to the property for which they were made, so that the assessment shall be equal and impartial in its results. If such new assessment prove ineffectual, either in whole or in part, the City Council or Board of Trustees may, at any time within said period of five years, order a third, and so on, to be levied in the same manner and for the same purpose; and it shall constitute no legal objection to such assessment that the property may have changed hands, or been incumbered, subsequent to the date of the original assessment, it being the true intent and meaning of this section to make the cost and expense of all public improvements, to be paid for by special assessment, a charge upon the property assessed therefor, for the full period of five years, from the confirmation of the original assessment, and for such longer period as may be required to collect, in due course of law, any new assessment ordered within that period."

It is my opinion that the same conclusion is to be drawn with reference to the limitation in Par. 164 above, and that "The meaning and object of the legislation was to charge the land in question with its share of the expense of making the improvement in question, to be ascertained by assessment, and the term of five years was allowed for the making of a valid assessment. A valid assessment, once made, was a lien, and could only be discharged by payment of the assessment. This statute was intended to charge the land at once for an unascertained amount, to be fixed by assessment. The only effect of this five years' limitation is, that the amount must be fixed and limited to a specific amount within five years; otherwise the land should be discharged. The amount, when

fixed, was to remain a charge until paid. The five years' limitation was made for cases of an abortive effort at assessment, involving the necessity of a new assessment, and has no reference to the case of a first valid assessment."

Paragraph 155 above, plainly states the duty of the City Collector, and notwithstanding the neglect of some former collector to return all delinquent lots, lands, etc., it is my opinion that there is no objection to the present City Collector returning all lots, pieces and parcels of land found delinquent even as remote as 1892, to the County Collector in 1898.

Yours respectfully,

A. F. TEEFY,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

DECEMBER 6, 1897.

MR. R. A. WALLER, City Comptroller.

Dear Sir:

I have your favor of December 6th, addressed to this department, saying that the County Collector has not completed the sale of property for delinquent taxes for the current year, nor made returns thereon, and asking if the matter could be hurried in any way.

There are two different sections of the statute relating to the subject of your inquiry.

Section 114, Chapter 24, Starr & Curtis, Cities and Villages Act, under the head of "Assessment and collection of taxes," reads as follows:

"It shall be the duty of the officer collecting such tax to settle with and pay over to such treasurer, as often as once in two weeks from the time he shall commence the collection thereof, all such taxes as he shall then have collected, till the whole tax collected shall be paid over."

Section 246, Chapter 120, Starr & Curtis, relating to "Revenue", reads as follows:

"The County Collector shall report and pay over the

amount of the tax and special assessments, due to towns, districts, cities, villages, corporations and persons, collected by him on delinquent property, at least once in every ten days, when demanded by the proper authorities or persons."

Section 247, same chapter, is as follows:

"Any County Collector failing to make the report and payments hereinbefore required, for five days after the time specified for that purpose, or after demand made as aforesaid, the auditor or such other authorities or persons, may bring suit upon the collector's bond."

Section 248, same chapter, relates to the same subject, it is as follows:

"If any County Collector fails to account and pay over as required in the preceding sections, his office may be declared vacant by the County Court, or by any court in which suit is brought on his official bond."

You will notice that there is a difference of four days in which the County Treasurer must settle with the city as directed by Chapter 24, Cities and Villages Act, and Chapter 120, relating to "Revenues", the one saying he must account and pay over in two weeks, and the other in ten days. I think, however, that Sections 246 and 247, would prevail in this case, as they are more explicit as to the method to be pursued. I am of the opinion that the County Collector must pay over to you at least once in every ten days when demanded the amount due to the city and collected by him on delinquent property. In the event of his failing to comply with this section of the statute suit could be commenced on his official bond, or a petition of mandamus could be filed against the officer. This, I believe, is the information which you desire.

Very truly yours,

DENIS E. SULLIVAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

DECEMBER 14, 1897.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

I have yours of November 27th, relative to the liability of the C. & N. W. Ry Co. for its share of the expense of maintenance and repair of certain viaducts crossing its tracks.

I note the ordinances quoted by you in your letter; whereby certain railroad companies named therein are required to *erect* and *maintain* viaducts over their tracks, and also providing that other railroad companies (not named) whose tracks are crossed by said viaducts shall join in the payment of their fair proportion of the cost of such maintenance and repair.

The Supreme Court of this State has held in many cases that the police power vested in the city empowers it to compel the railroad companies to adopt such safeguards and such a system of crossings and approaches thereto as will best promote public safety and protect life and limb. (See *C. & N. W. Ry. Co. v. Chicago*, 140 Ill. 309.)

In the exercise of its police power, the city can compel the railroads to elevate their tracks, or to build viaducts over them, in order to better preserve public safety, and such being the case, the railroad companies must bear the expense incurred in complying with the police regulations of the city. The ordinances referred to by you commanded certain companies named to *erect* and *maintain* viaducts over their tracks, and provided also, that any other railroad company whose tracks were crossed by the viaducts should join in the payment of their fair proportion of the costs of such viaducts. The fact that the C. & N. W. Ry Co. was not specifically named therein renders it none the less liable, provided, it is, in fact, one of the companies whose tracks are crossed by the viaducts erected under the said ordinances. *Id certum est, quod certum reddi protest*. It is merely a question of proof, and that fact being proved the C. & N. W. Ry. Co. would be held just as firmly as if specifically named.

The fact that the company has paid its proportion of the cost of original construction is valuable as evidence, and

I am of the opinion that the C. & N. W. Ry. Co. can be compelled to pay its fair proportion of the cost of maintenance and repair of such viaducts as cross its tracks.

Very truly yours,

WM. H. ARTHUR,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

DECEMBER 17, 1897.

MR. JOSEPH KIPLEY, Supt. of Police.

Dear Sir:

Replying to your letter of the 15th inst., inquiring as to whether you have the power to suppress the shows and theatrical entertainments given in store windows, which obstruct the travel on the streets by attracting crowds:

Under the following provision of the city charter, 92d sub. of par. 63, Art. 5, Chap. 24, Starr & Curtis, viz:

“To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams and horses.” The City Council has the power to prevent these shows.

You have been given the power to remove obstructions in the streets under paragraph 1886 of the Revised Code, viz:

“He shall take notice of all nuisances, impediments, obstructions and defects in the streets, avenues, alleys and public places of the city, and shall remove the same, or cause immediate notice thereof to be given to the proper officer whose duty it may be to take measures in relation thereto, according to the ordinance of the city.”

The Commissioner of Public Works also has been given this power under Paragraph 1867 of the same, viz:

“The streets, alleys and sidewalks in the City of Chicago shall be kept free and clear of all obstructions, incumbrances and encroachments for the use of the public, and shall not be used or occupied in any other way than is herein provided.”

The paragraph of the Revised Code which most nearly describes this particular nuisance is 1324, viz:

“No person shall engage in any game, sport, amusement, or exhibit any machine, or show, or any animal, or indulge in any acrobatic feats in the streets or upon the sidewalks; nor shall any person carry on any performance or do anything whatsoever in the streets or upon the sidewalks, which shall collect any crowd of persons so as to interfere with the passage of teams or vehicles, or persons passing along the streets and sidewalks; and any person who shall do any of these things shall be fined not less than three dollars nor more than twenty-five dollars for each and every offense.”

I doubt whether this is broad enough to allow you to go into the store and upon the premises of a private citizen and abate the nuisance. I think your action thereunder and under Par. 1486 would be confined to dispersing the crowd.

The City Council has the power, however, to pass an ordinance to cover the case exactly, if it chooses to do so. But if this is not done, the following language was used by the court in *Jaques v. The National Exhibit Co.*, 15 Abb. N. C. 250, following *Doellner v. Lyman*, 38 How, p. 176, and quoted with approval in Beach on Injunctions, Section 1077, viz:

“The approaches to plaintiff’s store and the sidewalks were blocked up frequently each day by a puppet show given by way of advertisement in the windows of defendant’s store opposite. It was held that an injunction should be granted to prevent the show as an unreasonable and injurious method of advertising.”

From which view of the courts in an exactly similar case, it will be apparent, that any adjoining store proprietor may by injunction proceedings forthwith abate the nuisance without further action by the City Council.

I am of the opinion that the provisions of Paragraphs 100 and 107 do not apply to these cases, as they are intended to apply to “Entertainments” which would be licensed by the city. Under no circumstances would it be advisable for the

city to treat these shows as entertainments for which a license might be procured.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

DECEMBER 21, 1897.

MR. JOSEPH S. MARTIN, City Collector.

Dear Sir:

I have yours of the 16th inst., relative to the licensing of auctioneers in the Stock Yards district, and have carefully considered the questions therein raised.

Under the present ordinance relating to "Auctions and Auctioneers", as set forth in Ch. VII, p. 24, of the Revised Code of Chicago (1897), I believe that the practice adopted by the several firms, whose cards you enclose, is permissible.

Any person may become an auctioneer and obtain a license to conduct such business, at a place to be named in the license. Of course, it is not presumed that a person who takes out a license to act as an auctioneer does so merely for the purpose of selling his own goods. It is a business, and he has his clients and can act for as many of them as it is possible for him to act, provided he carries on his business at the place designated by his license, or that he has the privilege of carrying it on somewhere else upon a special permit from the Mayor so to do. The business cards you enclose with your communication do not purport to be the cards of auctioneers, but of firms engaged in the business of selling horses on commission, a business for the conducting of which no license is required. It is true that each of these cards bear a legend, "Auction Tuesdays and Saturdays", or some similar notice, but there is absolutely nothing in the ordinances to prevent this, and all that is required is that the person who acts as auctioneer has a license to so act and that he complies with the provisions of the ordinance as to place, etc.

The threat made by certain firms which have taken out

a license to the effect that they will ask for a refund of the money paid therefor unless all other firms are required to obtain a license, is futile. They applied for a license to act as auctioneers, received it, paid for it, and are now entitled to carry on that business, if they see fit.

The fact that other horse dealers do not care to take out a license to act as auctioneers also, affords no ground for the refunding of a license fee paid by a horse dealer who desired to be an auctioneer also.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

DECEMBER 21, 1897.

M. J. DOHERTY, Supt. of Streets.

Dear Sir:

Replying to your letter of the 20th inst., requesting this department to take steps to cause certain corporations and parties to remove obstructions from certain streets pursuant to an order of the City Council dated October 13, 1897:

The City Charter, 10th Sub., Par. 63, Art. 5, Chap. 24, Starr & Curtis, is as follows, viz:

“To prevent and remove encroachments or obstructions upon the same.”

Under the foregoing power the City Council has enacted Paragraph 1872 of the Revised Code, viz:

“Obstructions—Removal. The Commissioner of Public Works is hereby authorized to order any article or thing whatsoever which may incumber or obstruct any street, alley, public landing, wharf or pier within said city to be removed; if such article or thing shall not be removed within six hours after notice to the owner or person in charge thereof to remove the same, or if the owner cannot be readily found for the purpose of such notice, he shall cause the same to be removed to some suitable place, to be designated by the said Commissioner. The owner of any article so removed shall

forfeit a penalty of not more than ten dollars, in addition to the costs of such removal."

I have been informed by your office, that one of the obstructions is a track of the Chicago & Northwestern Railroad Co., that after diligent search, the Department of Public Works is unable to find any permit for such encroachment by said railroad company, that all the other obstructions are the raw material, manufactured goods, tools or refuse of different citizens and corporations.

Therefore, I am of the opinion that the order of council above referred to is amply sufficient to protect the Department of Public Works in the summary removal of said obstructions.

As to the cost thereof, said Paragraph 1872 gives the authority to charge it to the several offenders; the law department would expect you to make the removal in such a manner as to be able to furnish testimony as to the proportionate cost to each offender, to be used in case of suit to enforce the payment of same.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JANUARY 3, 1897.

MR. F. E. DAVIDSON, Superintendent of Sewers.

Dear Sir:

Answering your letter of the 15th ult., asking if it is necessary for the city to obtain an easement for the construction of the proposed intercepting sewers where such sewers are to be laid under the tracks, right of way, or land of any railroad company, I have to say:

The Charter of the City contains the following provisions: The City Council shall have power—

"To construct and keep in repair culverts, drains, sewers and cess-pools, and regulate the use thereof."

Cl. 29, Par. 63, Ch. 24, Starr & Curtis R. Stat., 1896.

"The City Council shall have power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way, or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company, the city shall restore such railroad track, right of way or land to its former state, or in a sufficient manner not to have impaired its usefulness."

Cl. 9, id.

First. As to the sewers to be laid under railroad tracks within streets:

If the track under which the sewer is to be laid is within a street, and the interest of the railroad company is that of an easement in the street, and the city is the owner of the fee of the land in the street, it can, I believe, after the passage of requisite ordinances, upon notice to the railroad company, construct such sewer; provided that no appreciable damage will result to the railroad company. The law in our State is that—

"The grant to the railroad company being, not that of a street nor a part of a street, but only the right to lay and use tracks in the street, the right of the public in the street is paramount to that of the railroad company for all other purposes than that of transit. (2 Redfield on Railways, 375, Sec. 7, and authorities cited in note.) And the right of transit in the street does not imply that it shall be enjoyed in the unlimited discretion of the railroad company, but only that it shall be enjoyed with reference to co-existing rights of others in the streets, and in subordination to the public welfare. See Dillon on Mun. Corp. (4th ed.), Sec. 713, et seq., and notes; Elliott on Roads and Streets, 334, 335."

C., B. & Q. R. R. Co. v. City of Quincy, 139 Ill. 360-361.

See also *Kirby v. Citizens St. Ry. Co.*, 48 Ind. 168.

But where probable permanent damage to the railroad company will result, either from the existence or constructing of such sewer under or through the track or right of way, then, such damage must be judicially determined in a condemnation proceeding, or be agreed upon by the parties.

The latter mode is contemplated in the words "or otherwise" of the above Clause 89.

Second. Of course, it is very clear that where the sewers are to be laid under or through tracks or right of way, over land held in fee by the company, that the city must acquire the right or easement for the laying of the sewers through such land, as in other cases of the "taking or damaging of private property for a public use," as declared by the constitution must be done.

A reasonable amount of inconvenience and delay to business is not such damage as requires the making of compensation. They are part of the burdens subject to which the company's privilege is granted.

C., B. & Q. R. R. Co. v. City of Quincy, supra.

Notwithstanding the foregoing views, as a matter of practicability, it would be well I think to obtain, where that can be done, the consent of the different companies to the construction of the work.

Very respectfully,

CORA B. HIRTZEL,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JANUARY 10, 1898.

MR. R. A. WALLER, City Comptroller.

Dear Sir:

Replying to your letter of the 7th inst., enclosing a letter from Hon. L. E. McGann, Commissioner of Public Works, requesting an opinion as to whether the expense of maintaining the Canal Pumping Station should not be paid out of the water fund, I quote the following:

Par. 63, 40th Sub., Art. 5, Chap. 24, Starr & Curtis.

"To provide for the cleansing and purification of waters, water courses and canals, and the draining or filling of ponds on private property, whenever necessary to prevent or abate nuisance."

Par. 175, Art. id.

"The City Council or Board of Trustees shall have the

power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years, also to prevent the unnecessary waste of water, *to prevent the pollution of the water*, and injuries to such wells, pumps, cisterns, reservoirs or waterworks."

Par. 1112, Revised Code of Chicago, 1897.

"It shall be the duty of every person, officer and department having any authority and control in regard to any water designed for human consumption (and within the proper sphere of the duty of each thereof) to take all usual and also all reasonable measures and precautions to secure and preserve the purity and wholesomeness of such water."

Inasmuch as the sole object of the Canal Pumping Station is, *to prevent the pollution of the water*, in the language of the statute, and as the charter also gives authority to the City Council, *to provide for the cleansing and purification of waters*; it follows very naturally that Paragraph 1112 of the Revised Code above quoted is designated to effectuate those powers, and therefore the entire expense of maintaining the said Canal Pumping Station should be paid out of the Water Fund.

Respectfully yours,

J. R. CORRIGAN,

Asst. Corporation Counsel.

O. K., GRANVILLE W. BROWNING,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JANUARY 29, 1898.

JOSEPH KIPLEY, General Superintendent of Police.

Dear Sir:

I have before me a letter from Nicholas Hunt, Inspector

of the Second Police District, which is addressed to you, enclosing a clipping from the "Chicago Times-Herald", of January 19, 1898.

This letter and newspaper article in substance say, that Justice Porter of the Hyde Park Station holds the law to be that the City of Chicago has no jurisdiction to prosecute the keepers of so-called "blind pigs" in the Hyde Park prohibition district. I understand that you wish some advice from this department as to how these violators of the law may be prosecuted.

I will point out to you what rights and powers the City of Chicago acquired at the time of the annexation of the Village of Hyde Park which I think will be all that is necessary for your guidance.

Section 211, Chap. 24, Revised Statutes of Illinois, provides that upon annexation "the jurisdiction of the incorporated city, village or town to which such other incorporated city, village or town is annexed shall extend over said territory."

Hence you will see under this section the jurisdiction of the City of Chicago was extended over and its ordinances applied to the Village of Hyde Park for all purposes except where otherwise provided.

Section 228, same chapter, makes an exception to this general provision and has a direct bearing on this question. It reads as follows:

"When a part or the whole of an incorporated town, village or city is annexed, under the provisions of this act, to another city, village or incorporated town, and prior to such annexation an ordinance was in force prohibiting the issuing of licenses to keep dram shops within said territory so annexed or any part thereof, or providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dram shops, then such ordinance shall continue in full force and effect notwithstanding such annexation."

Continuing, this section describes how the voters of the district may pass upon the question of whether they shall have

dram shops within certain territories or not, and concludes as follows:

“It is intended by this section to continue in full force and effect all ordinances of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dram shops is prohibited or regulated within said city, village or incorporated town, or any part thereof, without the voters of the territory so effected consent, as hereby provided, to the repeal of such ordinance by the city, village or incorporated town, to which the territory is annexed.”

The voters of Hyde Park have never repealed these ordinances. Consequently, you will see that by this section of the statute all ordinances of the Village of Hyde Park in relation to regulating dram shops which were in force at the time of annexation are still in force and effect and prosecutions should be made thereunder.

Chap. XV, of the Revised Municipal Code, of the Village of Hyde Park relating to “Dram Shops” is in reality now part of the ordinances of the City of Chicago, and provides a penalty ranging from one to two hundred dollars for a violation of any of its provisions, and if in the future you will bring your prosecutions under this ordinance I think the difficulties of which you complain will be overcome.

Respectfully,

DENIS E. SULLIVAN,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

MARCH 2, 1898.

AZEL F. HATCH, Esq., President Chicago Library Board.

Dear Sir:

Relative to the matter of the controversy between the Chicago Public Library and the Grand Army Hall and Memorial Association of Illinois, concerning which you ask for an opinion as to the relative rights of said corporations respectively in the matter of the maintenance of the Memorial

Hall, I would say, that in view of the Act of the Legislature of the State of Illinois, entitled "An Act to authorize the Chicago Public Library to erect and maintain a public Library on Dearborn Park in the City of Chicago, and to authorize the Soldiers' Home in Chicago to sell and dispose of its interest in the north one-quarter of the said park," approved June 2, 1891, and especially of the provisos thereof, I am of the opinion that it is obligatory upon the Chicago Public Library to maintain the Memorial Hall which it has constructed in accordance with the provisions of said act.

The following is the language of that act material to this controversy :

"And provided further, that in case the Chicago Public Library shall obtain by purchase or otherwise, whatever interest the Soldiers' Home in Chicago may have in said north one-quarter ($\frac{1}{4}$) of Dearborn Park, then and in such case the Chicago Public Library, in erecting such library building, shall construct in such part of it as it may elect or determine, a hall, to be known and forever maintained as a memorial hall, to commemorate the patriotism and sacrifices of the Union soldiers and sailors of the late civil war, which hall when completed may be leased by the Chicago Public Library at a nominal rental, for the period of fifty years, to the Grand Army Hall and Memorial Association of Illinois, to be used by it and such other organizations of Union soldiers and sailors of the late civil war having their headquarters in Cook County, as it may direct, for the purposes of their organization."

The words "shall construct" and "to be known and forever maintained", must, I think, be construed together, that is to say, that the Legislature in authorizing the conveyance of Dearborn Park to the Chicago Public Library, not only intended to require of the grantee the duty of constructing but also that of maintaining a Memorial Hall to commemorate the patriotism and sacrifices of the Union soldiers and sailors of the late Civil War. In arriving at this conclusion it is necessary also to consider that two years before this enactment the Legislature had authorized the Soldiers' Home in Chicago to erect and maintain a soldiers' memorial hall,

and had charged the Soldiers' Home not only with the duty of construction, but also of the maintenance thereof. It was, I think, the design of the Legislature to charge the Chicago Public Library, in consideration of taking the fee of this property, with all the duties which the former Act had devolved upon the Soldiers' Home, and that the grant authorized by Section 2 of the said Act of June 2, 1891, was made in strict subordination to and charged with the trust involved in the former Act, entitled "An Act to authorize the Soldiers' Home in Chicago to erect and maintain a soldiers' memorial hall in the north one-quarter of Dearborn Park in the City of Chicago," approved June 4, 1889. I think it necessarily follows from a careful reading of these Acts that the Grand Army Hall and Memorial Association of Illinois, and such other organizations of Union soldiers and sailors of the late Civil War having their headquarters in Cook County, as it may direct, for the purposes of their organization, are to be regarded as *cestuis que trustent*, or beneficiaries. It certainly must have been the intention of the Legislature, not only to have such a memorial hall constructed, but also to be forever maintained. To this end the Chicago Public Library, being a corporation, a being in *perpetuam*, was undoubtedly the instrumentality intended for that purpose. This seems to be the entire end and scope of the provisos under consideration.

I have carefully examined a printed copy of that certain document purporting to be an agreement between the Soldiers' Home in Chicago and the Chicago Public Library, of date October 24th, 1891, executed and signed "The Soldiers' Home in Chicago, by Thomas B. Bryan, President." I think that the Soldiers' Home did not have any power or authority to impose any terms or conditions upon the beneficiaries of the Memorial Hall in view of Section 2 of the said Act of June 2d, 1891.

The ordinance of the City of Chicago granting Dearborn Park to the Board of Directors of the Chicago Public Library for a library building, passed by the City Council May 19th, 1890, contains the following proviso:

"Provided, That in erecting such building the said Board of Directors shall make provision for a Memorial Hall, for

the use of such organizations of Union soldiers and sailors of the late Civil War as have their headquarters in Cook County, to be used by them for the purposes of their organization, and for the preservation of relics and mementoes of the late Civil War, at a nominal rent, merely for the purpose of attornment, for the period of fifty years and no longer."

It seems that this lack of power in the city to make such an ordinance was the occasion for the grant of the Legislature of June 2d, 1891, and must be regarded as of binding force as to the construction of the said Act. It must, I think, be apparent that the construction which I have here placed upon this Act is the only reasonable one, from the fact that all the associations and organizations of soldiers and sailors made by it the beneficiaries as aforesaid, were at the time when said Act was passed without the means and necessarily from the very nature must be entirely unable to furnish the means for the maintenance of such a monument to the patriotism of their members respectively as the grand memorial hall which the Chicago Public Library has constructed in Dearborn Park. Again, too, the utter impropriety of requiring these beneficiaries themselves to maintain such a hall to commemorate the patriotism and sacrifices of the Union soldiers and sailors of the late Civil War is apparent, and seems to be conclusive against any other construction of this Act than that the Chicago Public Library, an institution in which every citizen of the City of Chicago has a deep interest and feels a conscious pride, an institution which is to stand as long as the city continues, forever, is charged with the duty of forever maintaining the said Memorial Hall.

The word "maintain", as given by the Century Dictionary, is as follows: "To furnish means of subsistence or existence; sustain or assist with the means of livelihood; provide for; support; as, to maintain a family or army; to maintain a costly equipage."

The objection to the appropriation of the funds of the city for such a purpose, suggested as being contrary to the constitutional provision inhibiting a donation or a loan in aid of a private corporation, is answered, I think, fully by the fact that the establishment and maintenance of such a

Memorial Hall is a corporate purpose and strictly within the trust imposed upon the City of Chicago as a municipality.

See Sections 2942 and 2950 of the Revised Code of Chicago, being Sections 5 and 13 of the Act of March 7, 1872, relating to libraries, and also Subdivision 86 of Section 1, of Article 5, of the General Act for the Incorporation of Cities, which gives the City Council power to provide for the erection and care of all public buildings necessary for the use of the city or village. The library building is as much for the use of the inhabitants of the city as any of the other public buildings of the city, and the Memorial Hall as much for public use as any other part of the building, although it is specified that it is to be leased for a nominal rent for fifty years to the said Memorial Association. The books, documents, papers and memorials collected and preserved in said hall are akin to the books and documents within the immediate keeping of the public library and the reversionary interest in said hall as well as to everything collected by these associations, make the whole matter in any view which can be taken of it, in my opinion, decidedly a public use and consistent with all the provisions of the Act relating to the hall or public library.

See also Sections 1160 and 1161 of said Revised Code relating to the library.

I am, therefore, of the opinion that the Act of June 2d, 1891, imposes upon the Chicago Public Library the duty of maintaining the Memorial Hall in the sense of furnishing heat, light and other expenses of care and support of the premises to be leased to the Grand Army Hall and Memorial Association; that the Library Board has the right to use or appropriate the library fund to pay the expenses of light and heat of the said premises, and that the articles of agreement of October 24th, 1891, are not binding upon the Grand Army Hall and Memorial Association. The said contract of 1891, even if authorized by the Grand Army Hall and Memorial Association of Illinois, in view of the obligation of the Chicago Public Library to forever maintain such a Memorial Hall as the said Act prescribes, would not be binding upon the association, nor would it relieve the Chicago Public Library from

the condition of the grant to Dearborn Park as made by said Act.

In framing my opinion as to the merits of this controversy I have carefully read the very able statement of the President of the Library Board, other arguments in consonance with and adverse to the opinions therein expressed, and I have also conversed with members of the Board, and with representatives of the Grand Army Association. I have found very little difference of opinion as to the length of time the ante-rooms would be needed by the Memorial Association. The youngest member of that organization is, I am informed, sixty years of age. It is improbable that the association will require for its use the ante-rooms for a period exceeding ten or fifteen years from this date. I am informed that you suggested at one time a concession of twenty years, at another twenty-five years, and I am told that the members of the Memorial Association are willing to deduct from their term of fifty years a reasonable number of years. I would therefore suggest that the term of the lease be fixed at thirty years from this date, with the understanding that the Grand Army Hall and Memorial Association shall voluntarily terminate said term whenever it may find that it no longer needs the space which has been allotted to it, and to which it is now entitled.

Very truly yours,

CHAS. S. THORNTON,
Corporation Counsel.

MARCH 14th, 1898..

HON. CARTER H. HARRISON, Mayor of Chicago.

Dear Sir:

Replying to your inquiry as to whether days upon which primary elections are to be held are holidays under the law, and whether upon such days saloons shall be closed, I have to say that Section 8 of the Primary Election Law prescribes that:

“All the laws of this State respecting the general elections in this State, now or hereafter in force in any election precinct or district in such county, city, village or incorporated town, except as the same are modified by the provisions of this

Act, and so far as the same are applicable to the primary elections provided for in this Act, are hereby declared to be in force in each primary election district respecting the primary elections provided for in this Act.

And Section 79 of Chapter 46, among offenses and penalties, specifies the following:

“No spirituous, malt, vinous or intoxicating liquor, shall be sold or given away at retail, nor shall any saloon or bar room, or place where such liquor is so sold or given away, be open upon any general or special election day, within one mile of the place of holding an election. Whoever violates the provisions of this section shall be fined a sum not less than \$25 nor more than \$100. It shall be the duty of the sheriff, coroner, constables and other officers of the county and magistrates to see that the provisions of this section are enforced.”

Section 22 of Article 2, of the City and Village Act of 1885, also provides that:

“The days upon which the general, State or county or city elections shall hereafter be held in such city, village or incorporated town, shall be holidays, and shall, for all purposes whatever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, and as regards days of grace upon commercial paper, be treated and considered as is the first day of the week, commonly called Sunday.”

I am of the opinion, therefore, that it is your duty as Mayor to declare a holiday upon the occasion of each primary election held under the Primary Election Law, and that on said days all saloons within the city limits shall be closed.

Very truly yours,

CHAS. S. THORNTON,

Corporation Counsel.

MARCH 16, 1898.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

I have your favor of March 3d, 1898, addressed to this

department wherein you ask for an opinion as to the legality of proceeding with an assessment for sewers in a district formed partly within the Sanitary District of Chicago and partly outside.

As I understand it, you wish to know if the act of 1889, establishing the Sanitary District partly within the corporate limits of the City of Chicago in any way divested the city of its right to spread an assessment for the construction of sewers and drains in that part of the Sanitary District lying inside the city limits.

The Act creating what is known as the Sanitary District was not intended by the Legislature as a limitation upon the right and power of the city to provide for and construct sewers.

* In *Wilson v. the Board of Trustees of the Sanitary District of Chicago*, 133 Ill. 443, the Court said:

“There are no constitutional restrictions as to the boundary line of public or municipal corporations within which new corporations may be formed, except as to counties. It is wholly unnecessary that the corporate authorities of the new corporation shall be also the corporate authorities of some specific pre-existing corporation.

“So it will violate no principle of constitutional law to create a district and vest it with the powers of taxation for sanitary purposes, co-extensive of the territory to be controlled. The propriety of the creation of such a municipal corporation belongs alone to the General Assembly, not to the courts.”

The question really presented is whether the city authorities proceeding under the Act of 1885, and in conformity therewith, may provide for the construction of drains and sewers within the city, in territory also included within the Sanitary District. The rights and powers of the Sanitary District and the city with relation to the territory in question, and to each other, were, I think, fully set forth in *Rich. v. the City of Chicago*, 152 Ill. 18.

The Court said: “Enough has been stated to show the

evident purpose and intention of the Legislature to attempt the ultimate bringing of the sewerage and drainage of the district into channels and outlets therein provided for, and it is equally apparent that the construction of the 'adjuncts and additions' authorized by the Act is dependent upon the construction and completion of the main channel or channels. Their only purpose is to accomplish the end for which such main channels are designed. It could not have been within the legislative contemplation that the sewerage system of the incorporated city or village within the Sanitary District should pass immediately under the control of the Trustees of the Sanitary District.

"Undoubtedly upon the completion of the main channel, and when such channels and 'adjuncts and additions' are so extended that the lands of the Sanitary District are drained thereby the statute contemplates that such channels and auxiliary drains and ditches, 'adjuncts and additions', will be under the control of the Trustees for drainage purposes, and that the sewage and drainage of the district be discharged, through such lateral 'adjuncts and additions', into such main channel or channels. Upon the organization of the Sanitary District of Chicago, it is a matter of common knowledge that the Trustees entered upon the construction of the channel contemplated by the Act, by which water from Lake Michigan was to be turned into the Desplaines and Illinois rivers. From the magnitude of the work prescribed by the statute, it must have been known that some years in time and large sums of money will be required in its construction. It is apparent that these considerations were within the legislative contemplation in passing this act, and it cannot be supposed that the Legislature intended that in the interim, and until the system of sewerage of the Sanitary District should be completed, there should be no authority in the City of Chicago to construct, extend or otherwise provide for the sewerage and drainage of the city."

I do not believe there are any legal objections to an assessment, such as you describe, arising from the fact that the

sewers to be constructed are partly within the Sanitary District of Chicago.

Very respectfully,

DENIS E. SULLIVAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

APRIL 7, 1898.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

I have yours of the 24th ult., submitting several questions relative to the petitions of property owners for the construction of street railways, and will reply to same seriatim.

First. "As to the necessity of verifying the signatures of the petitioners."

The question of verifying the signatures of property owners who consent, or who are supposed to have consented, to allow a street railway to occupy the street in front of the signer's property presents a very vexed problem.

This department has under previous administrations had occasion to pass upon it several times, and it has been the uniform ruling that a petition presented purporting to contain the signatures of property owners should be presumed in the absence of proof to the contrary to be what it purported to be. While it is true that following the strict rule of law, no fraud will be presumed, and therefore it was a technically correct ruling, still the numerous complaints of forgery and of the unauthorized signing of frontage consents, which are made by abutting property owners in almost every instance in which a street railroad company obtains the right from the City Council to lay tracks upon a street or streets, leads me to believe that the greatest care should be exercised in examining these petitions in order to detect fraud.

It is true that if this be done and the petitions be not regarded as *prima facie* genuine, a vast amount of labor will be entailed upon the department of public works. It will be necessary in order to properly verify the signatures, to prove the genuineness of each and every signature either

by examination of the alleged signer or of trustworthy witnesses familiar with and competent to testify as to the genuineness of same.

The importance, however, of affording ample protection to the owners of property, particularly in fine residence districts, against the rushing through of fraudulent petitions asking the council to grant the right to lay tracks on streets where the majority of property owners is undoubtedly opposed to the granting of such rights, warrants, in my opinion, the exercise of every possible precaution to guard against fraud.

Again the mere fact that the City Council refers it to you for verification means, that that body does not assume the petition to be just what it purports to be, and that all the signatures thereon are genuine.

It is referred to you for verification; that means to ascertain whether as a matter of fact the signatures *are* genuine and that the parties signing own the property for which they sign.

Second. "Am I required to certify the ownership of property?"

The answer to this question is practically to the same effect as that to the first. I believe you are required to verify the ownership as nearly as may be. You are not, or should not be expected to examine or have examined, the abstract of title to the property in each case. I believe such an examination as the Map Department usually makes of the tract indices and records is sufficient, but an examination to that extent should certainly be made.

Third. "Should the signature of a person formerly the owner of the property signed for but which has since been transferred?"

I presume it is intended to ask whether the signature should be counted of a person formerly the owner of the property signed for but who has since signing and before the presentment of said petition to the City Council transferred his title to said property to another.

I do not believe such signature should be counted. The party owning the property at the time the petition is to be

acted upon by the council is the one who is interested and will suffer damage if any damage is done.

The former owner has no interest and can suffer no damage and his signature is really that of a stranger and should be so regarded.

Fourth. "If owners of property can authorize agents to sign?"

This is a proposition which admits of no doubt. It is too well settled in law. A property owner can most certainly delegate the power to sign frontage consents to an agent, and where one signs as an agent for an owner in the absence of proof to the contrary he will be presumed to have the authority to so sign. His authority, however, as a matter of precaution, should be proved in the same manner as you prove the authenticity of owners' signatures.

Fifth. "If trustees of estates owned by minors can be authorized to sign other than by order of court?"

The authority of a trustee is only such as is given him by the instrument creating the trust. A trustee signing frontage consents should be required to show that he was authorized so to do either by the court or by terms of his trust.

Sixth. "If, under the law, any other duty devolves upon the Commissioner of Public Works other than a plain statement of fact as to the character of the petition submitted to him?"

Under the law there is, strictly speaking, no duty whatever cast upon the Commissioner of Public Works in regard to frontage petitions, and so far as I can learn he is acting merely in a clerical capacity for the City Council in reporting on these petitions. It would seem to me that the proper method for him to pursue would be to confine himself to a plain statement of fact as to the character of the petition submitted. If John Jones owns property on the street in question and his name has been signed to the petition unauthorizedly and the Commissioner is so informed, such information should be reported to the City Council, and any other fact developed in the process of verification should also be reported.

Seventh. "Does the Allen Law require verifications to be made in other manner than was required by the old law?"

In answer will say that it does not.

The so-called Allen Law, known as Chap. 131a, Hurd's Revised Stat. (1897), in so far as it relates to the securing of frontage consents is almost identical with Clause 90 of Par. 62 of Chap. 24, Cities and Villages Act (Hurd's Rev. Stat., 1897, p. 272), which last mentioned clause was the only provision requiring the securing of frontage consents existing prior to the passage of the Allen Law, and it has been inserted practically in its entirety in that act.

With reference to the subject matter of your first two questions I have a suggestion to make as follows:

When your report and verification of the frontage consents is made to the City Council, that it be published in the Council Proceedings and that no action be taken by the City Council toward the passage of an ordinance granting the desired privilege on such petition until one week shall have elapsed from the date of publication in the Council Proceedings. This would give interested property owners an opportunity to point out any forgeries or unauthorized signatures which may have escaped your scrutiny and the City Council could then act intelligently on the matter with danger of doing injury to any property owner along the street in question greatly lessened.

To that end I submit herewith an ordinance which, if passed, will answer the purpose fully.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON, .

Corporation Counsel.

APRIL 9, 1898.

MR. JOHN J. POWERS, Chairman, Finance Committee.

Dear Sir:

In relation to the claim of E. B. Stark against the

City of Chicago for extra services rendered, I beg to say, that I find, according to his statement, that he was employed by the month as a watchman in the Water office. His attached statement further shows that he worked for a period of two years and now claims pay for overtime rendered during that period.

The law applicable to this case is as follows:

"Voluntary performance by a servant of extra work does not entitle him to extra pay." *Kublitz v. Rowell*, 66 Wis. 671.

"If a servant employed for a term is required to labor an unreasonable number of hours each day he cannot recover anything for extra work during the term, unless there was an express promise to pay him therefor. His remedy in case he is required to labor an unreasonable number of hours for a day's work is to quit the service." *Woods, Master and Servant*, p. 172; *Lowe v. Marlowe*, 4 Ill. App. 420.

I have not inquired as to the truth of any of the facts alleged in his claim, but applying the law to his own statement I am of the opinion that he cannot collect payment for such services.

Very truly yours,

DENIS E. SULLIVAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

APRIL 15, 1898.

MR. ERNEST HUMMEL, City Treasurer.

Dear Sir:

I have your favor of April 12, 1898, addressed to this department, with attached exhibits, in which you ask if a city employe can legally assign his pay, earned and unearned.

In reply, I beg to say that almost unanimously the assignment by a public officer of unearned salary or fees has been held invalid. This rule rests upon the ground of public policy which forbids anything tending to weaken the effi-

ciency of the public service, inasmuch as an officer who thus anticipates his compensation has less inducement to faithfulness in the discharge of his duties.

In *Bliss v. Lawrence*, 58 N. Y., P. 442, the court in passing on this question, said:

“The public service is protected in protecting those engaged in performing public duties; and this not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service by seeing to it that the funds provided for its maintenance should be received by those who have performed the work, at such periods as the law has appointed for their payment.”

As to the question of salary already earned, I cannot see any legal objection to the assignment by an employe of such salary, as the grounds of objection to an assignment of prospective emolument do not apply.

Story on Contracts, Sec. 709.

As to the question what liability you incur by accepting these orders, I will say that as to the orders for unearned salary, you would on account of their invalidity, be held not bound to pay them though the safer way would be a refusal by you to accept them.

As to the orders drawn on salary already earned, and in your possession, I am of the opinion that the acceptance by you of such an order accompanied by the proper voucher or warrant would create a legal liability in you for their payment.

Yours very truly,

DENNIS E. SULLIVAN,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

APRIL 25, 1898.

MR. F. A. DAVIDSON, Superintendent of Sewers, and
Member of the Board of Local Improvements.

Dear Sir:

Your communication of April 23, 1898, relating to com-

bining several petitions for sewers in sundry streets into one, has received careful consideration.

As the object of the act concerning Local Improvements of June 14, 1897, seems to be that publicity be given to every proposed improvement and that the same should pass the ordeal of a public hearing, I think it a matter of doubt whether action upon such petitions so combined would stand the test against objection made as to the confirmation of an assessment for an improvement thus originated. Ordinances for public improvements, according to the act, originate in two ways; either by petition, or by action of the Board. I am of the opinion that where action is taken upon a petition by the Board to be followed by an ordinance and the recommendation of the Board, as prescribed, the proposed improvement should be described therein with legal certainty and that there should be no variance between the description in the petition and the same description in the ordinance as recommended.

If I am correct in this it would be impracticable to combine sundry petitions and act upon them as though they together constituted one improvement. Where in the opinion of the Board several petitions should be combined, or a system of sewers should be constructed, the Board by originating an ordinance itself would overcome all difficulty.

The decisions of the courts indicate that the ordinance for a public improvement has been the object of many vulnerable attacks, and especially because of the uncertainty of the improvement described therein. Heretofore the ordinance has been held to be the foundation of the whole proceeding, and uncertainties therein, or insufficiencies thereof, have proved fatal in many cases, so that it is necessary to exercise supercaution not only as to the ordinance, but as to the preliminary steps made necessary thereto, which give the Board of Local Improvements its jurisdiction to act.

As to your inquiry as to the sufficiency of the description of the improvement in the petition for a drainage system, I am of the opinion that each individual street or alley in which each and every branch in said system is to be located, shall be specifically mentioned. The petition precedes in contem-

plation of law, if not in fact, the making of plans for the improvement asked for by the petitioners. In the preparation of a petition for any public improvement, the nature and character of the improvement should be distinctly stated and specified so that there can be no mistake in regard to it, for, as asked for, if the prayer of the petition is granted, so it must be recommended by the Board. After the property owners have signed the petition, any amendment therein altering the place of beginning or of ending a sewer—for example; or any other substantial change in the petition, would make it another and different improvement. If the matter is to start by the petition, there being no provision for its amendment, I am clearly of the opinion that the petition should present the matter with legal certainty and that it should go through into the ordinance without material change.

Very truly yours,

EDWARD J. HILL,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

APRIL 29, 1898.

MR. R. A. WALLER, City Comptroller.

Dear Sir:

Replying to the inquiry attached hereto, I have to say that the 66th Par. of Art. 5, Chap. 24, Starr & Curtis, is conclusive in favor of the conclusion that the publication of all ordinances in the Council Proceedings as they are at present published, is sufficient to establish their legality on that point, without publication in a newspaper.

Each pamphlet of the Council Proceedings is now prefaced by the words, "Published by authority of the City Council of the City of Chicago," etc.

The paragraph of the statute above referred to is here quoted, viz:

"All ordinances and the date of publication thereof, may be proven by the certificate of the clerk, under the seal of the corporation. And when printed in book or pamphlet

form and purporting to be published by authority of the Board of Trustees or the City Council, the same need not be otherwise published; and such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances as of the dates mentioned in such book or pamphlet, in all courts and places without further proof."

See also, *Lindsay v. Chicago*, 115 Ill. 120.

People v. Mason, 139 Ill. 306.

Wapella v. Davis, 39 Ill. App. 592.

Baker v. Maquon, 9 Ill. App. 155.

Bethalto v. Conley, 9 Ill. App. 339.

Some doubt might exist as to whether the provisions of the 65th Par. of Art. 5 might not govern in the case of ordinances directing the expenditure of money and special assessments, which paragraph is as follows, viz:

"All ordinances of cities and villages imposing any fine, penalty, imprisonment or forfeiture, or making any appropriation, shall, within one month after they are passed, be published at least once in a newspaper published in the city or village, or, if no such newspaper is published therein, by posting copies of the same in three public places in the city or village; and no such ordinance shall take effect until ten days after it is so published and all other ordinances, orders and resolutions shall take effect from and after their passage, unless otherwise provided therein."

I therefore call your attention to the reasoning of the court in the case of *Standard v. The Village of Industry*, reported in the 55 Ill. App. at pages 524, et seq., and give some pertinent quotations therefrom, viz:

" . . . The Statute (Paragraph 65, Chap. 24, R. S.) provides that 'all ordinances of cities and villages imposing any fine . . . shall, within one month after they are passed be published at least once in a newspaper published in the village . . . and no such ordinance shall take effect until ten days after it is published.'

"Another mode of publication is, however, provided by Paragraph 66 of the same chapter of the statutes. It is as follows: ' . . . all ordinances and the dates of publication thereof may be proven by the certificate of the clerk

under the seal of the corporation. And when printed in book or pamphlet form and purporting to be published by authority of the Board of Trustees, or the City Council, the same need not be otherwise published; and such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinance, as of the dates mentioned in such book or pamphlet in all courts and places without further proof.'

"The authorities of cities or villages may, we think, adopt either mode. In the case at bar the ordinances were printed in pamphlet form in accordance with the provisions of Paragraph 66, but not within one month after their passage.

"The appellant contends that the two paragraphs are to be construed together, and the requirement in Paragraph 65 that the publication shall be made within one month held to apply to both modes of publication and deemed mandatory. That the paragraphs should be construed together we concede, but we do not think the designation of time in which the publication is to be made is mandatory.

"Provisions as to time and proof of publications are generally construed liberally by the court. I Beach, Pub. Corp., Sec. 502 * * *.

"The designation of time in which the publication shall be made does not touch upon the power or authority of the Village Board to enact the ordinance.

"The object to be attained by the publication of ordinances is to give notice of their passage to the public, in order that the municipal laws may be known to those required to obey them.

"The provision that no such ordinance shall take effect until ten days after it is published, is also applicable to ordinances published by either mode. The right of the public to notice is fully preserved, whether the publication is within the specified time or not. The designation of the time within which publication by either mode shall be made ought not to be deemed mandatory, and the ordinances declared void, but should be held to be directory only, for there is, as we think, nothing in the nature of the act to be performed or in the language of the statute to indicate that the designa-

tion of time was intended as a limitation upon the power of the city authorities to make the publication after the time fixed for publication in a newspaper."

The opinion of which the foregoing is a part was filed October 29, 1894, and is therefore so recent that it may be considered as the ruling authority.

I conclude finally that the City Council may lawfully direct all ordinances to be published in the pamphlets of the Council Proceedings, or in a newspaper, as may seem preferable.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

MAY 10, 1898.

THE W. B. CONKEY COMPANY, Chicago.

Gentlemen:

In reply to your letter dated April 30, 1898, I wish to say, that, although Ch. 120 of the Revenue Law (Starr & Curtis, 1896 Edition), Par. 3, Rules for valuing personalty, in subdivision *fourth* thereof, provides:

"PROVIDED, that in all cases where the tangible property or capital stock of any company or association is assessed under this act, the share of capital stock of such company or association shall not be assessed or taxed in this State. This clause shall not apply to the capital stock, or shares of capital stock of banks organized under the general banking laws of this State, or under any special charter heretofore granted by the Legislature of this State; PROVIDED, FURTHER, that companies and associations organized for purely manufacturing purposes or for the mining and sale of coal, or printing or for publishing of newspapers, or for the improving and breeding of stock, shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed."

It is my opinion that the W. B. Conkey Company would

not come under the saving clause contained in the above statute, exempting the capital stock of companies for merely manufacturing purposes therein provided, at least judging from the allegations contained in the bill filed, and which shows that their charter provided that "the object for which it is formed is to do a general electrotyping, lithographing, engraving, printing, binding, book manufacturing and publishing business in all its branches." Therefore the State Board of Equalization added the additional amount upon the capital stock of the company under their power and authority so to do. See Par. 109, Sec. 108, Starr & Curtis' 1896 Edition:

"The State Board of Equalization shall assess the capital stock of each company or association, respectively, now or hereafter incorporated under the laws of this State, in the manner hereinbefore in this act provided. The respective assessments so made (other than the capital stock of railroad and telegraph companies) shall be certified by the Auditor, under direction of said board, to the County Clerk of the respective counties in which such companies or associations are located, and said clerk shall extend the taxes for all purposes on the respective amounts so certified the same as may be levied on the other property in such towns, districts, villages, or cities in which such companies or associations are located."

The decision of the State Board of Equalization is quasi-judicial in its nature, and on application for judgment for unpaid tax, such decision can be assailed only for fraud or want of jurisdiction.

Connecting R. Co. v. The People, 119 Ill. 182.

Nor can the courts relieve against excessive valuation of property by State Board.

Republic, etc., Ins. Co. v. Pollak, 75 Ill. 292.

Nor will a court of equity enjoin the collection of a tax assessed by the State Board of Equalization unless it be shown that the assessment was fraudulently made, or that the property assessed was not liable to taxation, or that the legislature in authorizing the tax has disregarded or tran-

scended the principles of equity, or that a tax has been levied when not authorized by law.

La Salle, etc., H. & D. R. Co. v. Donahue, 127 Ill. 27.

Of course there is a fighting chance to try and persuade the upper court that such a manufacturing company as the W. B. Conkey Company comes within the purview of the proviso in the above section, but it is my humble opinion that it does not.

The injunction was dissolved, the bill dismissed, and an appeal prayed on April 26th, allowing the W. B. Conkey Company thirty days to perfect their appeal. It is also my opinion that, even pending this appeal, unless the appellant deposited with the County Collector the amount required, the property is still subject to a levy being made, unless the appeal or writ of error should be made a supersedeas, which the Supreme Court seldom or never does.

Yours respectfully,

ARMAND F. TEEFY,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

MAY 20, 1898.

TO THE HONORABLE THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

In accordance with an order passed by your honorable body at its last regular session, held May 16, directing the Corporation Counsel to furnish "an opinion as to whether or not the City Council is legally empowered to order the City Railway Company to transfer all passengers landed by the electric cars that now stop at the corner of State and Van Buren streets in the City of Chicago to the State street grip-trains that run around the loop," etc., I beg leave to submit the following:

A street railway company is a company engaged as a common carrier of passengers, in cars propelled along the streets. As a common carrier its business is of a public

nature and is undoubtedly under the control of the Legislature, so far as the regulation of the rates of fare and the protection of the traveling public from extortion and oppression is concerned. This doctrine is well settled by numerous decisions of our own courts as well as of the Federal courts.

Ruggles v. People, 91 Ill. 256;

Ruggles v. People, 108 U. S. 526;

Stone v. I. C. R. R. Co., 108 U. S. 541.

These decisions, with many others, establish the doctrine that the power to fix rates of fare, make and enforce reasonable police regulations for the protection of the public and govern the exercise of the franchise granted public corporations in any reasonable manner not conflicting with the contract feature of the charter granted, is lodged in the Legislature.

Such being the case, and it being equally well settled that the Legislature may delegate its powers in such matters to a municipality established under the State laws, it remains to be seen whether the Legislature of this State has delegated to the City of Chicago, the power to regulate common carriers, etc.

The 42d clause of Paragraph 63 of Article 5, Chapter 24, Starr & Curtis' Rev. Stat. of Illinois, being part of the Act under which this city is organized, gives the City Council power—

“To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all *others pursuing like occupations*, and to *prescribe their compensation.*”

In the case of *Allerton v. City of Chicago*, 9 Biss., 552, which was a proceeding had to determine the right of the City of Chicago, under the section just quoted, to fix a tax or license fee on and for each street car operated by street railway companies, it was decided—

“That street railway companies *pursue a like occupation* with hackmen, draymen, omnibus drivers, cabmen and expressmen, and are, therefore, within the provisions of the general law of 1872 for the incorporation of cities and villages in this State.”

It being considered settled that the section above quoted gives the power to the City Council to "*license, tax and regulate*" street car companies, as well as to "prescribe their compensation", and in view of the fact that the City Council is now exercising that authority by charging a license fee of \$50 per annum for each car operated and also fixing the maximum rate of fare to be charged, to my mind it follows as an irresistible conclusion that the City Council may also make any reasonable rule or regulation concerning the giving of transfers if such would promote the convenience and comfort of the public who use the street cars.

The power given to "*regulate*" undoubtedly means the exercise of a wise supervision and the making and enforcing of such rules and regulations as may seem fit and expedient in order to protect the traveling public from imposition. The ordinances granting the right to the Chicago City Railway Company to operate on the various streets of the south division certainly do not anticipate that the street car company, with continuous tracks running from various points in the south division to the heart of the city, shall discharge its passengers at a point several blocks south of the terminal point of its tracks and require them to walk or pay another fare for a continuous passage from the point of embarkment down town. Such a proceeding is unreasonable and extortionate. The street car company might with as great propriety and reason discharge its passengers at Thirty-fifth street and again at Twelfth street and charge three fares to get down to the business district.

The fact that the motive power changes at Van Buren street affords no reason for requiring a passenger to alight and pay another fare to get past that point and down town. The compelling of a passenger to alight and take another car is quite inconvenient enough and need only be tolerated by your honorable body on the ground of convenience to the street car company.

Again, Section 4 of the "Horse and Dummy" Act, in force since July 1st, 1874 (Sec. Ch. 66, Starr & Curtis' Stat., 1896), under and by which street railway companies are gov-

erned, so far as the State law is concerned, expressly provides that:

“Every grant to any such company of a right to use any street, alley, road, highway or public ground, shall be subject to the right of the proper authorities to control the use, improvement and repair of such street, alley, road, highway or public ground, to the same extent as if no such grant had been made, *and to make all necessary police regulations concerning the management and operation of such railroad, whether such right is reserved in the grant or not.*”

Thus it will be seen that this section expressly reserves the right in the city to make necessary police regulations concerning *the management and operation* of this street railroad company, and the requiring of a transfer in the manner suggested in your order is certainly a regulation concerning the “safety and convenience” of the public, and is therefore a police regulation.

From a consideration of the decisions quoted, together with the clause of the powers of the City Council and the section of the “Horse and Dummy” Act quoted, I am unqualifiedly of the opinion that your honorable body is legally empowered to require and can compel the Chicago City Railway Company to “transfer all passengers landed by the electric cars that now stop at the corner of State and Van Buren streets, in the City of Chicago, to the State street grip-trains that run around the loop, so that all passengers on said electric lines can reach the heart of the city for one fare, and also to transfer to the electric cars starting at Van Buren and State streets from the grip cars going south from the loop, all passengers desiring such transfer.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JUNE 29, 1898.

MR. E. A. HALSEY, Deputy Controller.

Dear Sir:

Replying to your letter of the 28th inst., as to whether or not the new United States revenue law which goes into effect July 1st, 1898, requires a two-cent revenue stamp to be placed on the checks with which the Police and Fire Departments of the city are paid.

It is said in Cooley on Taxation at page 700, viz.:

"All the property of a municipal corporation may be assumed to come from taxation."

The following language is found in the same authority at page 85, viz.:

"The Federal Government is also without power to tax the corresponding means or agencies of the States, or the salaries of State officers; the State in the exercise of its functions being entitled to the same immunity from congressional interference that the nation is from that of the State. And a State municipal corporation, being only a portion of its sovereign power, created as a convenient if not a necessary part of the machinery of State Government, is as much exempt from the taxation of the Federal Government, in all its revenues and property, as the State itself."

And again in Vol. 1 of Desty on Taxation the following, viz.:

"The State cannot tax money in the treasury, nor precious metals in the mint, nor the lots, structures, ships, materials of war, or other property devoted to the public purposes of the United States. Nor can the Federal Government tax the means and instrumentalities of the State Government."

Collector v. Day, Wall, 113.

Ward v. Maryland, 12 Wall, 427.

U. S. v. Railroad Co., 17 Wall, 322.

Railroad Co. v. Peniston, 18 Wall, 5.

Smith v. Short, 40 Ala., 385.

Freedman v. Sigel, 10 Blatchf. 327.

Warren v. Paul, 22 Ind., 279.

State v. Garton, 32 Ind., 1.

Moore v. Quirk, 105 Mass., 49.

Fifield v. Close, 15 Mich., 505.

Union Bank v. Hill, 3 Cold., 325.

Jones v. Keep's Estate, 19 Wis., 369.

Sayles v. Davis, 22 Wis., 225.

The City of Chicago being one of the "means and instrumentalities" of the State of Illinois, it follows as a matter of course that the tax referred to cannot be imposed.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JULY 1, 1898.

HON. L. E. MCGANN, Commisioner of Public Works.

Dear Sir:

Your communication of June 27th, 1898, in which you ask how the United States internal revenue law, which is to go into effect on July 1st, 1898, will effect our municipal documents, bonds, contracts, licenses, etc., is fully answered, I think, by the text of Section 17 of the Act which is as follows, viz.:

"That all bonds, debentures, or certificates of indebtedness issued by the officers of the United States Government, or by the officers of any State, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this Act; *Provided*, That it is the intent hereby to exempt from the stamp taxes imposed by this Act such State, county, town or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity; *Provided*, further, That stocks and bonds issued by co-operative building and loan associations or companies that make loans only to their shareholders shall be exempt from the tax herein provided."

I am of the opinion that the documents to which your

inquiry is directed are exempted by the terms of the Act above quoted.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

AUGUST 8, 1898.

HON. LAWRENCE E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your communication of July 27th, 1898, with letter attached from Walter T. Hart, as to the liability of the North Chicago Electric Railway Company to repay to the property owners the cost of paving laid before its tracks were put down, has been referred to me for answer.

By an ordinance passed July 27th, 1896, and accepted August 6th, 1896, granting to the North Chicago Electric Railway Company permission and authority to lay down, construct and operate for a period of twenty years a double track street railway on certain streets and boulevards therein mentioned, it is in and by Section 5 of said ordinance provided that:

“Said railway company shall pave the center sixteen feet of that part of said streets and boulevards hereby authorized to be used for railroad purposes at the time when its tracks shall be laid and in the event that streets and avenues or any of them shall have been paved before said tracks are laid, said company shall refund to the property owners the cost of said sixteen feet.”

I am of the opinion that under a familiar rule where a contract is made between two for the benefit of a third party, as in this instance, the property owners who have legitimate claims under this clause of the contract between the North Chicago Electric Railway Company and the City of Chicago, may proceed directly against the railroad company to recover in assumpsit for money paid out and expended for and on behalf of said railroad company, and that a property owner

would be entitled to recover in his own name upon such contract so made for his benefit.

The city has a remedy also against the said company upon the bond of indemnity which was required of said company by Section 13 of said ordinance.

Very truly yours,

EDWARD J. HILL,
Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,
Corporation Counsel.

(Not dated.)

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

The question has been submitted to me as to the obligation of the Chicago & Northwestern Railway Company to make repairs to the pavement under subways at Rockwell and Fulton streets and to provide proper facilities for thoroughly draining said subways.

The obligation to keep and maintain the pavement under these subways in good repair arises, if at all, under the ordinances of the city which provide for the elevation of the tracks of the railway company over these streets and the construction of these subways. Those ordinances were as follows:

As to Rockwell street, ordinance of March 30th, 1896 (in Council Proceedings for 1895 and 1896, p. 2247 et seq.).

As to Fulton street, ordinance of January 18th, 1897 (in Council Proceedings of 1896 and 1897, p. 1440 et seq.).

They are not alike in their terms in this respect, and therefore the obligation of the railway company in this regard differs as to these two subways: The ordinance of March 30th, 1896, simply imposes on the railway company the obligation to pave the roadway of subways, provided for therein, excepting of course such portions as the street railway companies were required to pave; but does not require it to maintain and keep the pavement in repair. While the ordinance of January 18th, 1897, specifically requires the railway companies (the Chicago & Northwestern Railway Company being

one of several companies, embraced in this latter ordinance) to maintain and keep in good repair all pavements of subways, which they are required by said ordinance to pave, it is clear that the Chicago & Northwestern Railway Company is bound to maintain and keep in good repair the portion of the pavement of the Fulton street subway, which it constructed, and, if it shall fail to do so, on being properly notified by the City of Chicago through its Commissioner of Public Works, it will be liable to the City of Chicago for the cost of making such repairs. But as to the Rockwell street subway, its obligation only extends to the original construction of the pavement, and it is not bound to maintain and keep it in good repair.

The obligation of the railway company to thoroughly and properly drain these subways is alike as to each of these ordinances, which provide specifically that they shall be "thoroughly and properly drained by construction of receiving basins properly located in or adjacent to said subways, which shall be connected with and discharge their contents into the adjacent sewer system." If this has not been properly done, and if the present means taken for the drainage of the subways are defective and insufficient, then it is clear that the railway company is bound to do what is necessary to make it sufficient. This obligation extends only to the system of drainage into receiving basins as provided by the ordinance; but the drainage by that system must be made thorough and complete at the railway company's cost.

The only possible question that can arise as to the present obligation of the railway company to obviate and remove any defects in the drainage of the subways, is as to the effect of the action of the Department of Public Works in accepting the work and the plans adopted for such work as originally done by the railway company. But if the work was not properly done and if the subways were not thoroughly and properly drained, owing either to defective work or plans, it is clear that the railway company has not fully complied with the ordinances, and is bound now to do so.

I am therefore of the opinion that the railway company is under no obligation to maintain and keep the pavement of

the Rockwell street subway in repair, and that it fully complied with its obligations as to that pavement when it constructed the subway and put in the pavement; but that it is bound to maintain and keep that portion of the Fulton street subway in good repair; which it was required by the ordinance of January 18th, 1897, to pave; and that it is bound to remedy any defective work as to the drainage of the subway, so that they shall be "thoroughly and properly drained", but only in accordance with the plans of drainage contemplated in the ordinances.¹

Respectfully,

S. A. LYNDE,

Assistant Corporation Counsel.

Approved:

GRANVILLE W. BROWNING,

Acting Corporation Counsel

AUGUST 30, 1898.

MR. EDW. B. ELLICOTT, City Electrician.

Dear Sir:

I have investigated the subject matter of your letter of the 29th inst., relative to your power to refuse to issue permits on applications made under the ordinance of the Commonwealth and Cosmopolitan Electric Companies.

As I understand from your letter, you believe that applications made by either of these companies for a permit to erect poles and string overhead wires anywhere within the district outlined on the map enclosed with letter (which is, roughly, Fullerton avenue on the north, Crawford avenue on the west, and Thirty-ninth street on the south), should be refused, for the reason that Sections 2022 to 2028, inclusive, of the Revised Code of 1881 prohibits the erection of telegraph poles or the stringing of overhead wires within the corporate limits of the City of Chicago, which were at that time practically embraced within the boundaries above set forth.

I am of the opinion that the passage of the ordinances of the two companies—that of the Cosmopolitan Electric Com-

¹Note: See opinion on page 893.

pany on the 4th day of March, 1895, in which the Council expressly granted the right to this company to erect poles and string overhead wires in any part of the city outside of the following boundaries, viz.: south of Fullerton avenue, east of Western avenue, and north of Thirty-ninth street; and that of the Commonwealth Electric Company on June 28th, 1897, in and by which the City Council expressly granted the privilege of erecting poles and stringing wires thereon in any of the streets of the City of Chicago outside of the following named boundaries, viz.: south of North avenue, east of Wells street, to Lake street, west on Lake street to Ashland avenue, south on Ashland avenue to Sixteenth street, east on Sixteenth street to Butterfield street, south on Butterfield street to Fifty-fifth street, and east on Fifty-fifth street to the lake—so far as these two companies are concerned, expressly repeals the provision of the ordinances mentioned by you.

I am of the opinion that either of these companies can compel the issuance of a permit to erect poles and string wires thereon within the districts described in their ordinances, by the terms of which they are allowed the privilege of erecting such poles and stringing wires thereon. These ordinances were passed subsequent to any enactment of the City Council prescribing the limits within which no poles should be erected, nor overhead wires be strung, and until the Council passes another ordinance exercising its police power by establishing limits within which poles and overhead wires cannot be erected, which will conflict with the rights given the said companies, the two companies named have the right to exercise the privileges granted in their respective ordinances.

Very respectfully yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

GRANVILLE W. BROWNING,

Acting Corporation Counsel.

SEPTEMBER 2, 1898.

MR. JAMES H. McANDREWS, Commissioner of Buildings.

Dear Sir:

I am requested to furnish your department with an opinion as to contemplated change in house at No. 96 East Fortieth street, fronting north, between Ellis avenue and Drexel boulevard, which the owner contemplates to change into a business building.

Section 49 of the Building Ordinance, as amended by the City Council on June 20th, 1898, provides that no person shall "locate, build, construct or keep on any street or avenue in any block in which all of the buildings are devoted to exclusive residence purposes, any building constructed or designed to be used for any business purpose whatsoever unless the written consent of a majority of the property owners or of the duly authorized agents of such owners of property on both sides of the street or avenue in such block shall first have been obtained and filed with the Commissioner of Buildings."

I am informed that all of the lots fronting on Fortieth street, between Ellis avenue and Drexel boulevard, are improved, and that all of the buildings are occupied as residences except one residence building which is temporarily occupied as a school. It is my opinion that such occupation comes within the section of the ordinance above quoted, and that a permit cannot be legally granted to put on that block any building constructed or designed to be used for any business purpose unless the written consent of the property owners is obtained as provided in the ordinance. If any permit has been issued for any such building on that block it should be revoked.

Yours very truly,
GRANVILLE W. BROWNING,
Assistant Corporation Counsel.

SEPTEMBER 7, 1898.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

Replying to your inquiry of the 2d inst., as to whether

an assessment can be levied for the construction of sidewalks to all approaches to viaducts¹ and bridges:

I have to say that the charter of the city, Chap. 24, Art. 5, Par. 63, Sub. 7, is as follows, viz.:

“To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.”

That Sub. 25 of the same is as follows, viz.:

“To provide for and change the location, grade and crossings of any railroad.”

The City of Chicago has the power to make any reasonable changes in the grade of the streets required in the exercise of the second power referred to above.

“The sidewalk is as much a highway as the middle of the street.”

Gridley v. Bloomington, 88 Ill. 554.

Chicago v. O'Brien, 111 Ill. 532.

“The control of streets includes the control of sidewalks.”

Bloomington v. Bay, 42 Ill. 503.

“An ordinance establishing a grade is not in the nature of a compact.”

2 Dill. Mun. Cor. 685, 686.

“With or without a prior ordinance, the city is free to establish, by ordinance, any grade it sees fit, subject only to the qualification that such grade is not so wholly unreasonable as to render the ordinance void.”

City of Bloomington v. Pollock, 141 Ill. 350.

In the case of *Burr v. Newcastle*, 49 Ind. 322, it was held under a power similar to the first one above quoted the city could establish the grade, and require lot owners to make their sidewalks conform thereto.

In Section 292 of Tiedeman on Mun. Cor., it is stated when the city has established a grade to which a lot owner had made improvements, he could not restrain the city from making a change of grade; that the power of the city is continuous; that the abutting owner has no claim against the city

¹Note: The request for this opinion did not present the question of the effect of the obligation on the part of any railway companies to maintain viaducts. See opinions on pp. 285 and 418.

for damages caused by a change in the grade of the street, in the absence of a statutory provision for such compensation.

Therefore, as there is a clause in all the ordinances for the elevation or depression of railroads in the city providing for and directing a change in the grade of the sidewalks approaching the bridge or subway from the original grade, I am of the opinion that the abutting lot owners must pay by assessment for the laying of the sidewalks at the new grade, in the same manner and by the same process as if the sidewalks were being laid or required for the first time.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

SEPTEMBER 21, 1898.

MR. R. M. JOHNSON, Chief Electrical Inspector.

Dear Sir:

I have yours of the 20th inst., relative to the collection of a bill for \$40, said to be due from the Field Columbian Museum for electrical inspection fees, and note what you say in regard to the Mayor's desire to know whether the buildings located within the parks of this city come under the jurisdiction of the city so as to permit a compulsory inspection by the City Electrician of electrical plants operated in the park premises and the collection of fees for such inspection.

A somewhat similar question has been considered several times in this department in regard to the inspection of steam boilers and the right to exact a license for the use of pleasure boats within the parks, and in each case and upon every occasion considered the same conclusion has been reached, viz.: that the city had no jurisdiction. This is so for the reason that the Park Boards are independent municipal corporations in themselves and so far as relates to the management of park property and the exercise of the authority granted by the Legislature, are possessed of paramount and exclusive powers.

Indeed, the Supreme Court of this State has said in the case of *W. Park Com. v. Chicago*, 152 Ill. 405:

“The Park Board, within the purview of its powers, is a corporation endowed with the same corporate functions, derived from the same source, and exercised in substantially the same way, as the City of Chicago. It is in no sense a corporation organized to exercise a portion of the municipal powers and functions of the city, and in subordination to it, but, within its own sphere, it has the same rank, and the exercise of its corporate powers is as exclusive of any power on the part of the city to interfere, as if the two corporations occupied wholly separate areas of territory.”

Following the reasoning of the court in the case quoted I am of the opinion that the city has no authority to enforce city ordinances relating to inspection, licenses, etc., within the limits of territory under the control of the park authorities.

Of course if the park authorities were to ask the city to inspect their electrical plant, the city could collect in such a case.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

SEPTEMBER 23, 1898.

TO THE HONORABLE THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Your communication asking for an opinion as to the obligations of the City Council in passing ordinances for public improvements petitioned for by a majority of the property owners is before me for answer.

Recurring to Section 34 of the Act concerning local improvements we may read the statute in which it is prescribed that, “It shall be the duty of such legislative body to pass an ordinance for said improvement and take the necessary steps to have the same carried into effect.”

There can be no mistake, I think, as to the meaning of this language. The recommendation of your board for the passage of ordinances where the owners of a majority of the property have petitioned as prescribed by said Section 34, is in my opinion of binding force and effect upon the City Council. This gives the broad and comprehensive jurisdiction in such matters to your board which renders it one of the most potent agencies in matters of local improvements.

I think that the refusal or neglect of the City Council to act as prescribed in such a matter would be sufficient to support a writ of mandamus from any court of competent jurisdiction to enforce the law and carry out the recommendation of your board. If this be so, then I am further of the opinion that the City Council is powerless to stay proceedings in such cases from start to finish. The will of the majority of the property owners who petition for any given local improvement must, I think, be respected. Their application to your board should be followed by prompt action, and if approved by your board, then a proper ordinance should be prepared and your recommendation with the estimate should be submitted to the City Council. Great care should be exercised in ascertaining that the petition in such a case is that of the owners of a majority of the property, as this fact is of primary and vital importance. It is jurisdictional.

Very truly yours,

EDWARD J. HILL,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

SEPTEMBER 26, 1898.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Replying to your letter of the 17th inst., as to whether or not it is lawful for the city to remove pipes of gas companies where in the line of water pipes being constructed by the city, when the gas companies fail to remove the obstruction upon

proper notice being given, I have to say that the city never loses control of the streets.

“A contract with a gas company, based on a valid consideration, allowing the company to lay pipes in the streets of a city, does not divest the municipality of power to lower the grade of its streets, and if necessary, to remove as nuisances the pipes thereby exposed to view, for the reason that a municipal corporation cannot alienate the express and plenary powers to grade and improve its streets granted to it by the Legislature.”

Section 1068, Beach on Pub. Cor.

Therefore, if due care is used by the city in removing the gas pipes after neglect of the gas companies upon due notice to remove them, I am of the opinion that the gas companies will be liable to the city for the expenses of such removing and replacing the gas pipes as is necessary to accomplish the street improvement in which the city may be engaged.

Respectfully yours,

J. R. CORRIGAN,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

OCTOBER 8, 1898.

EDWARD J. NOVAK, Esq.,

Chairman Judiciary Committee of the City Council.

Dear Sir:

There has been referred to me for an opinion, etc., a resolution with preamble in words and figures as follows:

“WHEREAS, It is charged that the Chicago Telephone Company has refused and is refusing in some instances to lease to parties desiring the same, public telephones at and for the rentals fixed by and pursuant to an ordinance passed January 4th, 1889, and published on page 742 of the Council Proceedings for the year 1888-9; and

“WHEREAS, It is further charged that said Chicago Telephone Company has resorted and is resorting to various expedients in order to compel lessees of such public telephones

to allow the same to be removed, and in lieu thereof permit said Chicago Telephone Company to install in the premises of such lessee what is commonly known as the "slot machine" telephone; and

"WHEREAS, The Chicago Telephone Company is under legal obligations to furnish and lease public telephones to all responsible persons applying for the same, at the prices and for the rentals fixed by and pursuant to said ordinance passed January 4th, 1889, and to render efficient and reasonable service to the lessees and others lawfully using said public telephones; now be it

"RESOLVED, by the City Council of the City of Chicago, That the Corporation Counsel be, and he is hereby, instructed to notify said company through its proper officers that upon a failure by said Chicago Telephone Company to comply with said obligation of said company, under and pursuant to the terms of said ordinance, the City of Chicago will take due and proper steps to compel performance of said obligation by said company; and the City Clerk also is hereby instructed to transmit a copy of this resolution to the president of said company."

To fully understand the nature and scope of the proposed resolution it is necessary to consider the ordinance of January 4th, 1889, which grants to said company its rights and privileges to operate telephones within the corporate limits of the city.

By Section 6 of that ordinance, with the acceptance of said company thereof, there was required to be filed by said company "A schedule showing the rates charged by said company for telephone service at the time of the passage of this ordinance within the limits of the city of Chicago."

That schedule is in words and figures as follows:

"CHICAGO TELEPHONE CO.

"Telephone Building, 203 Washington Street,

"Chicago, Ill.

"GEO. L. PHILLIPS, President.

"NORMAN WILLIAMS, Vice-President.

"C. H. WILSON, Superintendent.

"R. C. WETMORE, Secretary and Treasurer.

“Schedule showing the rates charged by the Chicago Telephone Company for telephone service on the 4th day of January, 1889, within the limits of the City of Chicago.

“Within the blue lines on the map of Chicago attached hereto, and made a part hereof, we charge one hundred and twenty-five dollars (\$125) per annum for telephone instruments connected by wire with our exchange, for the business use of the lessee and his employes alone. For the same connection to be used as a public telephone, with a right to permit the use to the general public, and charge therefor ten cents for a local connection, we charge twenty-five dollars (\$25) increase on the above price. We charge one hundred dollars (\$100) per annum for an instrument located in a residence and connected by wire with our exchange, the said instrument to be used only by the lessee and his family.

“Outside of the territory bounded by the above mentioned blue lines, we charge twenty-five dollars (\$25) per mile or fraction thereof, per annum, extra, except where the location of the instrument is distant from our pole routes, in which case we make a proportionate increase.

“THE CHICAGO TELEPHONE COMPANY,

“By Geo. L. Phillips, President.”

Which, together with the ordinance and the acceptance thereof, constitutes the contract between the City of Chicago and the Chicago Telephone Company and is of binding force and must govern both parties thereto. The telephone company is required to rent telephone instruments connected by wire with its exchange upon terms prescribed in the said schedule. Public telephones must be furnished upon the terms therein prescribed, that is to say, the company, by its said contract with the city, is required “to permit the use to the general public, and charge therefor ten cents for a local connection and \$25 increase upon the price” to be charged for a private telephone. There is no escape from this; the terms of the contract are plain and cannot be misunderstood. The introduction of the “slot machine” is, in my opinion, a direct departure from the terms prescribed in and by the schedule. Instead of furnishing public telephones at such rental the company is refusing to do so, and insists on placing

in their stead the so-called "slot machine", which enables the company to control both ends of the line for local connections. The income from a public telephone under the schedule plainly belongs to the lessee of the telephone instrument, where it is open to the use of the general public. It is plainly optional with such lessee whether he will make the charge or not, and the limit of the income to the company from the public use of that telephone is plainly \$25 in addition to the price charged for the business use of the lessee and his employes alone.

I am therefore of the opinion that the "slot machine" cannot under the ordinance be used by the telephone company, and that the same should be discontinued and the company required to adhere strictly to its contract with the city and to the terms prescribed in and by Section 6 of the ordinance and the schedule above set forth.

It will be observed that the departments of the city government are entitled to telephone instruments and their free use under the ordinance, but with this "slot machine" it is not possible for the agents and employes of the city to communicate through outside telephones without paying to the telephone company a tariff of ten cents for a local connection, which I think is contrary to the letter and spirit of the said contract between the city and the telephone company.

Very truly yours,

EDWARD J. HILL,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

OCTOBER 13, 1898.

MR. ROBERT LINDBLOM, President Civil Service Commission.

Dear Sir:

Your communication of the 3d inst. is received and referred to me for answer. You ask:

First. "Is a woman competent to act as an examiner under Section 6 of the Civil Service Act?"

The statute, March 22d, 1872, in force July 1st, 1872, is

a complete answer, I think, to this question. That law is as follows:

“That no person shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex; Provided, That this act shall not be construed to effect the eligibility of any person to an elective office.”

The competency of woman to fill public office was thoroughly discussed by our Supreme Court in the *Bradwell case* in 1869. See 55 Ill., p. 585. The Court then held that a woman, whether married or single, cannot be licensed as an attorney at law. In the *Schuscharde case*, 99 Ill., 501, it was held that woman is eligible to the office of master in chancery. The decision is based upon Act of March 22d, 1872, as changing the common law.

I am aware that the Civil Service Act prescribes that “the examiners at any examination shall not be members of the same political party.” If that test be applied to women the question might arise as to what political party a woman belonged in a given case. She is denied, except in certain cases, the elective franchise, but I think there is no difficulty in determining as to what political party she may be regarded as a member. I think that we cannot deny to her the possession of opinions upon political questions. Any woman who is capable of being an examiner at an examination under Civil Service rules must be capable of expressing clearly her opinions upon the questions which effect the public interests and doubtless would have a decided opinion which would enable your board to apply the test required by Section 6 of the Civil Service Act. I think your question must be answered in the affirmative. You ask:

Second. “Are we in holding promotional examinations limited to those actually holding position in the next lower rank?”

This question appears to be of simple solution because Rule VIII., Section 1, of the Civil Service Rules, prescribes as follows:

“All promotion in the classified service, unless herein otherwise provided, shall be from grade to grade and shall be made upon voluntary, open competitive examination. Com-

petition in such examinations shall be limited to employes in the next lower grade of the same division serving in the department in which the position exists, unless the Commission shall deem it for the interest of the service to admit to competition employes in other grades or other divisions serving in that or other departments."

"For a position in any grade above the lowest in any division of the service, the Commission will decide as to the practicability of filling the same through an examination for promotion; or whether the same shall be filled by an examination for original entrance to the service."

The provision in the foregoing section, "unless the Commission shall deem it for the interest of the service to admit to competition employes in other grades or other divisions serving in that or any other departments" clearly shows that in making the same your Commission had in mind the very question that you now ask.

I therefore respectfully submit in answer to your second question that you are not limited in holding promotional examinations to those actually holding position in the next lower rank.

Very truly yours,

EDWARD J. HILL,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

NOVEMBER 9, 1898.

TO THE HONORABLE THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

Replying to your request to report to your honorable body as to the provision in the Act creating the Board of Local Improvements, which deprives the City Council of discretionary power in the matter of levying assessments on property owners, I beg to say, that under the act approved June 14th, 1897, known as the Local Improvement Act, it is provided in Section 34 thereof that where a majority of the owners of property shall petition for any local improvement

in any one or more contiguous blocks abutting upon any street, alley, park or public place, that the Board of Local Improvements, provided for in said Act, of any city, village or town, shall take steps for the hearing of said petition; shall consider the nature of said improvement and the cost thereof, and shall determine in the manner in said Act provided, the nature of the improvement which they will recommend and shall thereupon prepare and transmit to the legislative body a draft of an ordinance, together with the estimate of the cost, and shall recommend the passage thereof, and "*thereupon it shall be the duty of such legislative body to pass an ordinance for the said improvement and take the necessary steps to have the same carried into effect.*"

This Act, of course, takes away from the Council powers which belonged to it before the passage of such enactment. It is a familiar proposition "that municipal charters are subject to repeal or amendment at the pleasure of the legislative power granting them. . . . The substitution of another charter with inconsistent provisions, without any saving clause as to the right of officers under the former charter," would have the effect of a repeal on the former charter.

Crook v. The People, 106 Ill., 244.

In the case of *Town of Fox v. Town of Kendall*, 97 Ill., 72, it is stated:

"The powers, duties and liabilities of municipal corporations, unless restrained by constitutional limitation, are wholly under the control of the Legislature."

By the terms of the repealing clause of the Act creating the Board of Local Improvements all Acts or parts of Acts in conflict therewith were repealed, so that the power to direct local improvements when petitioned for by a majority of the property owners is vested solely by the Legislature in the Board of Local Improvements. The Council's duty is merely perfunctory to pass such ordinances when they shall have been prepared and submitted in accordance with the provisions of Section 34, and it cannot exercise any discretion in the matter. The Legislature, under the Constitution of the State of Illinois is the representative of the entire public. The fee of the streets of this city is in the City of Chicago, but the

City of Chicago holds such fee for the use of the public—not for the use of the citizens of the City of Chicago alone—but for the entire public, of which the Legislature is the representative.

Such legislation as the Local Improvement Board Act is entirely competent, especially so in view of the legislation and decisions of the court in what was known as the Park Board Act, where the Park Boards are vested by the Legislature with legislative power within the district of the parks, and also in the Civil Service Act. The charter of the City of Chicago authorized the appointment by heads of departments of officers, employes and servants to carry out the functions with which the heads of departments are charged by law; yet the Legislature, in the passage of the Civil Service Act, without any attempt at amendment to the city charter, provided an entirely different mode for determining the qualifications, the mode and manner of appointment of applicants for positions under the heads of these departments, and in the case of the *People v. Kipley*, decided in February, 1898, in 171 Ill., and also in the case determined within the last week, known as the *Loeffler case*, the same doctrine is adhered to as was announced in the *Kipley case*. In the *Kipley case* the Court says:

“The Legislature has the power to control municipalities created by it. Such municipalities must look to the State for such charters of government as the Legislature shall see fit to provide; and while they have a right to manage their own local concerns, choose their own administrative and police officers, yet this right is subject to such exceptions as the legislative power of the State may see fit to make.”

The case of the *West Chicago Park Commissioners v. City of Chicago*, 152 Ill., 392, bears out to the very last degree the legislation herein questioned. In this case the City Council of the City of Chicago was held by the legislation creating the Park Board to have been deprived of all of its charter powers over the district within the jurisdiction of said board, although the park established lay entirely within the limits of the City of Chicago. The Court decided that “the powers of every municipal corporation are necessarily more or less lim-

ited, and the scope and extent of their corporate powers, and their limitations are always matters of legislative discretion."

The Local Improvement Act deprives the Council of powers which it formerly possessed, just as many other legislative enactments have done. Such legislation has been repeatedly sustained, and in my judgment there can be no controversy about the right of the Legislature to make this change.

Very truly yours,

CHAS. S. THORNTON,
Corporation Counsel.

JANUARY 29, 1899.

MR. ROBERT LINDBLOM, President Civil Service Commission.

Dear Sir:

My reply to your communication of January 12th, 1899, has been unavoidably delayed by pressure of duties and trying cases in court.

Promotions are governed by Section 9, of the Civil Service Act, which says that "The Commission shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion."

Pursuant to that section of the law, and under the provision of the Civil Service Act, the Commissioners have authority to make rules. Your honorable body made Rule 8, entitled "Promotion", Section 1, reading:

"All promotion in the classified service, unless herein otherwise provided, shall be from grade to grade and shall be made upon voluntary, open, competitive examination. Competition in such examinations shall be limited to the employees in the next lower grade of the same division serving in the department in which the position exists, *unless the Commission shall deem it for the interest of the service to admit to competition employees in other grades or other divisions serving in that or other departments.*"

You refer to so much of Rule 11, Section 1, "All original appointments on the police force shall be as second class patrolmen."

The appointment of a patrolman, now serving the City of Chicago, to the position of lieutenant or captain, pursuant to

examination, would not be an original appointment, so that to admit officers in the police force to these promotional examinations would be no violation of Rule 11, Section 1.

But what is a promotional examination?

By your own rule, duly published according to law, and which under the statute you had full authority to make, you state that competition in promotional examinations shall be "limited to employes in the next lower grade," but you further state "unless the Commission shall deem it for the interest of the service to admit to competition employes in other grades."

Under this Section 1, therefore, of said Rule 8, if your honorable body shall deem it for the interest of the police service to admit to competition at your promotional examinations for lieutenants and inspectors of police, patrolmen who are acting sergeants or acting lieutenants, you have full authority to do so under said Section 1 of said Rule 8, but, as before stated, said action would in no sense be a violation of Section 1 of said Rule 11.

An examination, therefore, for lieutenants into which, by resolution of your honorable body, you permit patrolmen, sergeants and acting lieutenants to enter, will be an examination for promotion under the statute, and the rules of the civil service.

In the same way an examination for inspectors of police will be a promotional examination if, by resolution under the statute and rules, you admit to such examination not only captains of police, employes in the next lower grade, but acting inspectors, lieutenants, sergeants or patrolmen, as your body may see fit to admit by resolution.

Very truly yours,
 GRANVILLE W. BROWNING,
Acting Corporation Counsel.

JANUARY 30, 1899.

MR. WILLIAM MAVOR, and Members of the Committee on
 City Hall.

Gentlemen:

Your Communication to the Corporation Counsel, con-

taining certain legal inquiries relating to the franchise questions involved in the so-called Allen Law, has been considered by me.

The Allen Law is drawn in such an involved manner, and wherever the rights of the municipality and of the citizen are treated, the omissions are either so striking or the language used is so ambiguous that any supposed protection afforded is involved in extreme doubt. It seems as if the entire object of the law as drawn was to protect existing ordinances from change, or to provide for their extension for a longer term without change.

The Act makes a difference between an original ordinance newly granted and the extension of an ordinance existing at the time of the passage of the Act. It is provided that in the case of a new ordinance giving a company the right to locate or construct its road in the first instance, such ordinance may be granted "upon such terms and conditions . . . as such corporate authorities . . . shall deem for the best interest of the public."

This provision is wanting when the Act relates to the extension of an existing ordinance. In treating of the extension of present ordinances there is an entire omission of those provisions which the growth of modern cities and the increased value of the street car properties render advisable.

Your first question is:

"If the city, in an ordinance extending present ordinances, should provide that the companies should sell a given number of tickets for a given sum entitling the purchaser to a ride for each ticket, the amount thus to be paid to the company to be less than five cents for each ride, and said company accepts such ordinance while the Allen Law is operative, would the binding force of said provision upon the company be free from reasonable doubt?"

The law as passed seeks to prevent the City Council from including the conditions you suggest in any extension ordinances.

In spite of the so-called Allen Law the City Council has the right to insist upon such conditions concerning fares to be charged as it sees fit, but I am clearly of the opinion that until

a law is passed free from ambiguity, and such as the people of the great State of Illinois have the right to expect from their law makers in the matter of clearness and in the matter of protection of the rights of the public, the City Council would best conserve the interests committed to its charge by granting no extension of franchises.

Your second question is:

“If such an ordinance passed and accepted under the Allen Law should fix rates of compensation to be paid to the city by the companies, would such provision be free from reasonable doubt?”

The Act in question contains no affirmative provision giving the city the right to fix compensation to be paid to the city by the corporations, for the use of the streets and other public property, in the case of the extension of an existing ordinance.

From the experience of municipalities in the past, I believe that an ordinance passed under the Allen Law, even containing proper provisions for compensation to be paid to the city by the companies, would lead to endless litigation on the part of the companies and their stockholders and bondholders, and would result in great expense to the city, and disquiet, suspicion and contention among the taxpayers and general public, and to the seizing of advantage by the companies not consistent with the public welfare.

Your third question is:

“What is your opinion of a like question concerning a provision in such an ordinance providing for a cash fare of less than five cents?”

Here again the distinction made in the Act between new ordinances and ordinances extending present ones is raised, and could well be used for vexatious and expensive litigation and contention on the part of the companies, even with the proper provision mentioned by you in such ordinances.

Your fourth question is:

“How would you regard any other provision in such an ordinance by which expense or restriction is placed upon the company, in requiring system of transfers, the use of certain

methods of transportation, the use of improved rails, the paving of streets, or otherwise?

Under the Allen Law no such provision could be inserted in an extension ordinance without the possibility of long and expensive litigation, resulting, it may be, from one cause or another, in the defeat of the public interests.

As to a system of transfers, the Act is decidedly ambiguous. It says that the fare "so fixed shall in no case exceed five cents for a single ride within the limits of any city." If this provision would seem to protect the public, such protection could be easily nullified by maintaining separate corporations.

Your fifth question is:

"If you hold that the companies in such case would by acceptance thereof be estopped from denying the validity of such provisions as are set forth in the preceding questions, or if it be assumed that the companies would act in good faith in the matter, is there a reasonable probability that a stockholder or bondholder in said companies, or any other person, could in any manner interfere with the enforcement of such provisions?"

I do not believe persons beneficially interested in the street car companies, such as stockholders or bondholders, could interfere to prevent such companies from carrying out provisions in their ordinances, whether original or by extension, which could be enforced against the companies themselves.

I believe, however, that owing to the absolute lack of positive provisions in the law securing the interests of the public, and the invitation contained in the law, as published, to dishonest or grasping persons, to take advantage of the silence or the ambiguity of the law where the protection of the public is involved, any extension ordinance containing reasonable conditions would be subject to endless litigation.

Yours very respectfully,

GRANVILLE W. BROWNING,

Acting Corporation Counsel.

MARCH 4, 1899.

MR. EDWARD A. HALSEY, City Comptroller.

Dear Sir:

On January 31st, 1899, I wrote you a letter concerning the interest bearing vouchers issued on account of work done under special assessment. I have since received a communication from George L. Thatcher, Esq., solicitor for the Standard Paving Company, in which I am informed there are certain vouchers in your office awaiting your signature, which are interest bearing vouchers. I am informed that these are to take the place of non-interest bearing vouchers which have been issued from time to time, but for which there have never been and are not now funds in the installment against which they were drawn.

Where there are funds to pay vouchers they should not be interest bearing, and vouchers should not bear interest if there are funds to pay for them in the hands of the city. But where, as in this case, by mistake of some of the departments, non-interest bearing vouchers are drawn against funds that do not exist, or are drawn against funds that have already, for one cause or another, been paid out, the same should be not only equitably but legally replaced by interest bearing vouchers of the same date. The law requires that vouchers not drawn on a present fund should bear interest, and where, as occurs occasionally, vouchers are drawn on installments which have already been exhausted in some way, new vouchers of the same date should be issued, which should draw interest until there is a fund actually present to pay the same.

Yours very truly,

GRANVILLE W. BROWNING,

Assistant Corporation Counsel.

MARCH 23, 1899.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

I have given careful consideration to the question involved in your letter of February 27th, in which you enclose a newspaper clipping regarding a decision by Judge Hanecy in which it was held that the Sanitary District should pay for

work performed by an inspector in excess of eight hours per day, notwithstanding the fact that such inspector was employed by the month.

I find that no written opinion was given in the case mentioned, and from consultation with Mr. Gilbert, attorney for the Sanitary District, I learn that no authorities were found touching upon the question involved. I further learn that the case has been appealed by the Sanitary District to the Appellate Court and that it confidently expected the decision of the lower court will be reversed.

You state that in view of the decision spoken of many of the city's employes claim compensation for overtime, notwithstanding the fact that they are employed by the year, month or week, and you ask if city employes are "entitled to pay for time given the city in excess of eight hours for each day."

The General Assembly passed legislation touching this question, as follows:

"On and after the first day of May, 1867, eight hours of labor between the rising and the setting of the sun, in all mechanical trades, arts and employments, and other cases of labor and service by the day, except in farm employments, shall constitute and be a legal day's work, where there is no special contract or agreement to the contrary.

"This Act shall not apply to or in any way affect labor or service by the year, month or week; nor shall any person be prevented by anything herein contained from working as many hours overtime or extra hours as he or she may agree, and shall not, in any sense, be held to apply to farm labor."

(See Act of March 5th, 1867.)

The City Council legislated upon this question also, and provided that:

"Eight hours of labor between six o'clock a. m. and six o'clock p. m., shall be and constitute a legal day's work for all employes performing manual labor for the City of Chicago, and working within its corporate limits. The provisions of this section shall not be construed to apply to or govern the police or fire departments, or any department or workshop where constant operation is necessary; Provided, however, That in all cases of necessity or emergency, superintendents,

foremen or others in authority are hereby authorized to work their employes such number of hours as such necessity or emergency may require. But for all labor performed in excess of eight hours in any one day such laborer or employe shall be entitled to and shall receive pay at the rate of time and one-half for all such labor performed."

(See 1688 Revised Code, 1897.)

I am decidedly of the opinion that the above legislation entitles no city employe not engaged in performing manual labor and who is employed by the year, month or week, to extra compensation for services performed for the city in excess of eight hours per day. Such has always been the position of the city on this question, and I believe it to be the correct position.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHAS. S. THORNTON,

Corporation Counsel.

JUNE 7, 1899.

FRANK I. BENNETT, Esq.,

Chairman of Judiciary Committee of the City Council.

Dear Sir:

In the matter of the legality of a proposed ordinance making a prohibition district of a portion of the territory known as the local option district of Hyde Park, and bounded as follows: Commencing at the intersection of the center line of Cottage Grove avenue and the center line of Fiftieth street, thence west along the center line of Fiftieth street to the center line of Prairie avenue, thence south along the center line of Prairie avenue to the center line of Fifty-first street, thence east along the center line of Fifty-first street to the center line of Cottage Grove avenue, extended, thence north along the center line of Cottage Grove avenue to the place of beginning, I beg to say that in my opinion the said proposed ordinance is illegal. The district in question is covered by the provisions of a local option ordinance of the Vil-

lage of Hyde Park passed and approved April 4, 1889, and said ordinance was in force at the date of the annexation of the Village of Hyde Park to the City of Chicago. Section 18 of the statute, entitled "An Act to provide for the annexation of cities, incorporated towns and villages, or parts of the same, to cities, incorporated towns or villages," in force April 25, 1889 (Hurd's Revised Statutes, 1898 Edition, page 298), is as follows:

"When a part or the whole of an incorporated town, village or city is annexed, under the provisions of this act, to another city, village or incorporated town, and prior to such annexation an ordinance was in force prohibiting the issuing of licenses to keep dram shops within said territory so annexed, or any part thereof, or providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain district of such proposed dramshops, then such ordinance shall continue in full force and effect, notwithstanding such annexation. * * *

It is intended by this section to continue in full force and effect all ordinances of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dramshops is prohibited or regulated within said city, village or incorporated town, or any part thereof, without the voters of territory so affected consent, as hereby provided, to the repeal of such ordinance by the city, village or incorporated town to which the territory is annexed."

As the legislature expressed its intent in plain words, there is no room for a construction of the said Section 18, and its provisions as stated must be strictly complied with. It is therefore clear that the said ordinance of the Village of Hyde Park is now in full force and effect, and that the same cannot be changed in any way whatever by the City Council, except according to the exact manner provided for in said Section 18; so that the proposed prohibition ordinance, which seeks to change the said ordinance of the Village of Hyde Park in a manner not provided for in said Section 18, if passed by the City Council, would be null and void.

In a recent opinion on the question of issuing a saloon

license and a renewal of a saloon license in the local option district of Hyde Park, this department held that the said ordinance of the Village of Hyde Park, which requires frontage consents for the issuance of a saloon license, and which, in the case of a protest by a certain proportion of the property owners in the neighborhood, requires frontage consents for the issuance of a renewal of a saloon license, was effective in the absence of such frontage consents to prevent the issuance of the said saloon license and the said renewal of a saloon license.

In the present opinion this department holds that the said ordinance of the Village of Hyde Park which established the local option district of Hyde Park is effective in connection with the act of the legislature quoted above, to prevent the change in the manner proposed, of a portion of the said local option district into a prohibition district.

Yours respectfully,

ROSWELL B. MASON,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JUNE 8, 1899.

MR. WILLIAM MAJOR,

Chairman Committee on Railroads, of the City Council.

Dear Sir:

In compliance with the request of the City Clerk for an opinion from this department in regard to the validity of an ordinance, entitled "An ordinance requiring street railway companies to equip and provide their cars with transparent destination indicators," I beg to submit the following:

The power of the legislature to regulate all business in which the public has an interest is conclusively settled by the case of *Munn v. Illinois*, 94 U. S. The proposed ordinance seems to be clearly within Paragraph 42, Section 1 of Article 5 of the General Incorporation Act, which gives the City Council power to "license, tax and regulate draymen,

omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations and prescribe their compensation."

The business of operating street railways is identical with that of operating an omnibus line—the only distinction being the street railway companies enjoy special privileges and operate in a manner more dangerous to the public. It is therefore a "like occupation" within the meaning of the statute. (See *Dean v. Chicago General Railway Company*, 64 Ill. App. 165; and the *City of Havana v. Vanlaningham*, 17 Ill. App. 62; also *Allerton v. City of Chicago*, 9 Bliss 552.)

The only question remaining to be decided is whether this ordinance is reasonable. This will depend upon all the peculiar circumstances of the case; but the courts in passing upon it will presume that it is a reasonable exercise of the power to regulate, unless the contrary appears on the face of the ordinance or from evidence properly introduced.

The ordinance appears to be one which would prove to be of great benefit to the public, and this ought therefore to be held a reasonable exercise of the power to regulate.

In regard to the order to the Commissioner of Public Works to notify the Atchison, Topeka & Santa Fe Railroad Company to erect electric lights at all crossings within the city limits, I would say that this is a more sweeping provision than is authorized by the ordinance. (See Revised Code of Chicago, p. 372, Section 1756.) This ordinance applies only to grade crossings and it is expressly provided "that the provisions of this section shall not require a light to be placed at any crossing where the Commissioner of Public Works shall deem the same unnecessary by reason of such crossing being already lighted."

The city has undoubtedly the right to enforce an order modified to comply with the ordinance. The next section of the ordinance provides for a penalty of not less than ten dollars nor more than one hundred dollars for each offense, and a further penalty for each day during which any crossing or intersection situated as aforesaid shall be permitted

to remain without such lights after one conviction as aforesaid.

These ordinances are clearly within the power granted to the City Council by Article V of the General Incorporation Act, Section 1, Paragraph 27 thereof, which authorizes the City Council to "require railroad companies to keep flagmen at railroad crossings and streets, and provide protection against injury to persons and property in the case of said railroad."

Respectfully submitted,
CLARENCE N. GOODWIN,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JUNE 12, 1899.

MR. WILLIAM D. KERFOOT, Comptroller.

Dear Sir: .

Your letter of June 6th, to the Corporation Counsel has been referred to me for answer. The question upon which you desire an opinion is as to the right of the City Council to order you to transfer money from the general fund to the special assessment fund, and as to your duty as Comptroller to carry out such orders.

The statute (Cities and Villages Act, Art. VII., Sec. 13) provides that:

"All moneys received on any special assessment shall be held by the treasurer as a special fund to be applied to the payment of the improvement for which the assessment was made," etc.

If any such money has been transferred to the general fund from the special assessment fund, such transfer is improper and the error may be and should be corrected by a re-transfer. Such a re-transfer is not an "appropriation" within the meaning of the word as used in cities and villages act, Art. VII, Sec. 2, providing for an annual appropriation ordinance and forbidding any further appropriation beyond what is specified in that ordinance. There is, however, warrant

for this transfer only where it is to correct a previous error and to replace moneys wrongfully removed from the special assessment fund.

As to the council orders directing you to pay out money for reimbursements of amounts erroneously paid for licenses or for refunds of special assessments, etc., I beg leave to say that while each order must be considered in the light of the facts in the particular case, it may be remarked in general that where money has been paid to the city under mistake, or where any person is entitled to money as a refund or rebate under special assessment proceedings, the city holds such money in a relation which may safely be termed different from that of an ordinary indebtedness. Under Article VII, Sec. 2, referred to above, the annual appropriation ordinance must contain an appropriation for "all necessary expenses and liabilities." Money paid to the city by mistake or which persons are entitled to have refunded to them does not come within the fair meaning of this statute. Moreover, it is clear from the local improvement act of 1897, Sec. 93, that the intention was to have special assessment rebates repaid to the proper person immediately on proof being made.

Yours truly,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JUNE 13, 1899.

MR. WILLIAM D. KERFOOT, Comptroller.

Dear Sir:

Your letter of the 5th inst., has been referred to me. You wish an opinion as to the best course to be taken to protect the city against possible liability in case certain duplicate special assessment vouchers, in the hands of Peter Fortune, should be paid, and subsequently the originals, which have been lost, should be presented by an innocent holder who purchased them for value.

I am of the opinion that the loss of the original voucher

does not render the city liable in any event. A voucher of this kind possesses no element of negotiability; even if it come into the hands of a *bona fide* purchaser for value, it would still be open to every defence which would have lain against it with its original holder. No equity of the city would be done away with, whatever became of the voucher.

In *People, ex rel. v. Johnson*, 100 Ill. 537, speaking of a county order or warrant (which has much more of the marks of negotiability than the voucher in question) the Supreme Court said:

“These orders serve as vouchers in the hands of the treasurer, and this was doubtless the primary object of the legislature in requiring them to be issued. This being so, the mere loss of the order in question, although endorsed in blank, could not have affected the right of Comiskey to payment for his services. It was, therefore, entirely proper for the County Board to order the County Clerk to issue a duplicate order for the amount, so as to provide the treasurer with the appropriate voucher on payment. This was done. The debt having been paid upon the surrender of the duplicate order, the original order became inoperative and void.”

I think it would be difficult to find a case which more nearly answers your question.

As a matter of policy, however, you would do well for your own protection, to insist upon an indemnifying bond from the claimant. Under Section 14, Negotiable Instruments Act, if a suit were brought against the city upon this voucher, the plaintiff might, in the discretion of the court, be required to execute a bond to the adverse party in a penalty at least double the amount of the face value of the lost instrument. In demanding a bond you will, therefore, be exacting from the claimant no more than the law would require of him, if he took his claim into court.

Yours respectfully,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JUNE, 20, 1899.

HON. CARTER H. HARRISON, Mayor.

• Dear Sir:

The Corporation Counsel has asked me to answer your letter to him of the 15th inst., in which you inquire whether it is necessary that the applicant for a license to keep a saloon or dram shop at the northwest corner of 51st street and Cottage Grove avenue, secure a majority petition on both sides of 51st street as well as on both sides of Cottage Grove avenue.

The legal question involved is the construction of that part of the Hyde Park ordinance of April 4, 1889, which provides that the "application shall be signed by a majority of the property owners according to frontage on both sides of the street in the block upon which such dram shop is to be kept." The important word, which alone need be considered is the word "kept" at the end of the sentence. The saloon or dram shop in this case is upon the corner of Cottage Grove avenue and 51st street, having its main entrance upon the former street and none upon the latter. If the ordinance spoke of "the block upon which such dram shop is to be" *located* or *situated* or used some word indicating mere position without bringing forward the idea of carrying on a business with reference to the use of the advantages of an adjoining highway, the easy answer to your inquiry would be that in such case the "location" or "situation" was on both streets and that following the ordinance, the signatures of property owners on both streets were required. Indeed, the street less used for the purpose of the business might be the one upon which abutted the greater frontage of the saloon property. But the word "kept" employed in the ordinance goes beyond the mere idea of location. It carries with it also the notion of conducting the business of a saloon or dram shop in the particular locality. If the dram shop, situated as here upon a corner, is not "kept" or "conducted" with reference to one of the streets so as to derive therefrom any advantage, either existent or possible, it may well be said that it is not so kept or conducted on that street as, under the ordinance, to require a majority of the property owners thereon to join

in the application for a license. The question becomes then narrowed to the inquiry whether in "keeping" a saloon or dram shop, located upon a corner, any special use or advantage is or may be made or taken of the fact of such location with reference to the less used street—the one which may be termed the side street. If there is such special use or advantage the saloon is "kept" upon that street. The difference in the amount or in the character of the use of the two streets may be great; but the difference is one of degree and not of kind. I consider this to be the true test.

Taking this test and applying it to the present case (or indeed to any case, is it possible that a dram shop located upon a corner will in any event fail to enjoy special benefits from the use of the side street which it could not enjoy were it conducted away from the corner?

In considering this question the present condition of the property seems immaterial. There may, in many cases, be no entrance upon the side street. The side street and the business "kept" in the dram shop may have no channel of communication whatever—not even a window opening upon the street. But the possibility of such use and communication always exists, whether it be taken advantage of at the time of the issuance of the license or a month later. The special benefit from "keeping" a dram shop on a corner may be obtained and used in various ways in practice;—additional facilities for access and exit for customers, better light and air and hence an easier arrangement of the interior accommodation of the place, opportunities for more effective advertising of the business, by use of the side walls or fences for this purpose,—these things and doubtless many others support the view that it is not possible for a dram shop to be "kept" upon a corner without being "kept" upon both streets. These modes of use are rights which the city cannot limit before, and cannot abolish after the license is issued. They are rights inherent in the lawful possession of any property.

Upon these considerations I am therefore of the opinion that in the particular case of the application for a license for a saloon at 51st street and Cottage Grove avenue, the

application should contain the signatures of a majority of the property owners on both sides, not only of the Cottage Grove avenue block, but of the 51st street block also.

Yours respectfully,

COLIN C. H. FYFFE,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JUNE 23, 1899.

MR. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

In reply to your letter of the 22d inst., transmitting letter of the Chicago General Railway Company, with respect to the lowering of their tracks to conform to the grade of the streets where 22d street and Lawndale avenue cross underneath the C. B. & Q. R. R. Co.'s tracks, and in which the Chicago General Railway Company refuses to comply with the notice which you have already served upon it to lower its tracks to said grade, I would advise that you proceed forthwith to have this work done of lowering the tracks of the said railway company to the grade established by the ordinance of January 24, 1898, which provides for the elevation of the tracks of the C., B. & Q. R. R. Co. to cross these streets.

I understand that the failure of the Chicago General Railway Company to lower the tracks to said grade is obstructing the work of paving said street at said points of crossing and of depressing the water pipes and sewer main so that it is clearly the right and duty of the City of Chicago to remove the obstructions to the progress of this work, and I should advise that you have this done through the street department of the City of Chicago, and have a record kept of the cost of doing it, for the purpose of collecting it from the Chicago General Ry. Co.

It is not necessary that the city should relay the tracks of the Chicago General Railway Company after the streets have been lowered to the new grade. If the Chicago General

Railway Company then desires to relay the tracks it should do so under your general direction and supervision, but at its own cost.

After the streets have been lowered to grade established by the said ordinance, it will be the duty of said railway company, under said ordinance, to pave 16 feet in width thereof; but this matter will have to be considered when the paving is done.

Yours truly,
CHARLES M. WALKER,
Corporation Counsel.

JUNE 29, 1899.

MR. THOMAS CAREY, Chairman Committee on Streets and Alleys South, of the City Council.

Dear Sir:

Your committee has referred to this office an ordinance introduced by Alderman Connor on the 15th day of May, in and by which it is designed to issue permits for street obstructions and excavations and secure compensation therefor, and you have asked this department to prepare a proper ordinance presumably desiring to attain the same object contemplated by Alderman Connor's ordinance.

In my opinion an ordinance permitting street obstructions and excavations therein upon payment of a specified sum, as contemplated in the ordinance before me, cannot be drawn so as to stand the test of the courts.

The city holds the streets in trust for the use of the public and can legally grant no permission to maintain obstructions thereon or therein for private purposes.

In the case of *Hibbard & Co. v. City of Chicago*, the City Council had authorized Hibbard, Spencer, Bartlett & Co., to erect a structure of glass and iron to be used as an awning over their shipping doors on Wabash avenue near Lake street, and under the authority thus granted, Hibbard & Co. proceeded to erect the awning and completed same at a cost of over \$3,000. The city authorities then decided that the authority had been illegally granted and ordered the structure removed. A bill was filed by Hibbard & Co. to

enjoin the city from removing or injuring the awning and the Supreme Court, in finally deciding the case, used the following language:

"The right of the public to the exclusive use of the streets for public purposes is inconsistent with the right of a private citizen to encroach thereon by the erection of a permanent structure. The streets are held in trust by the municipality, and this fact prevents the municipality from authorizing any encroachment on or obstruction of them by such structures."

In the case of *Field v. Barling*, reported in the 149th Ill. 556, a somewhat similar state of facts was considered. The City Council had by ordinance authorized the construction of a bridge or covered passageway across the alley known as Holden place, for the purpose of connecting Marshall Field's old store with what is known as "Field's Annex." The ordinance provided that "the lowest portion of said bridge or passageway shall not be lower than 18 feet above grade of alley and should be so constructed that free and unobstructed passage may be had under same," etc.

Barling, who was an adjoining property owner, filed a bill to enjoin the maintenance of the bridge, and in the decision of the Supreme Court, the following language was used:

"It is not claimed that the use of the streets can be permanently granted for private purposes, and we recognize an unquestionable law that the use of the streets * * * must be for the public, and that no corporation or individual can acquire an exclusive right to their use or to the use of any part of them, for private purposes."

From a consideration of the law, as laid down by our Supreme Court in the two cases cited above, as well as in numerous others, I am of the opinion that an ordinance such as is the ordinance introduced by Alderman Connor would not be a good and valid one. The city has the right to issue permits for temporary obstructions of the streets which may be necessitated from time to time by the exigencies of business, and when such permits are desired, the City Council may act upon the particular case in accordance with the facts

and circumstances thereof, and may exact compensation for the privilege granted, but I do not believe that an ordinance purporting on its face to allow the erection and maintenance of obstructions and excavations on and in the public streets for a specified sum per obstruction, should be passed by the City Council, and if passed, I am of the opinion that it would be nugatory and would confer no legal rights upon parties who might be led to believe they were obtaining legal privileges thereunder.

Very truly yours,

WM. H. ARTHUR,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JUNE 20, 1899.

MR. WILLIAM D. KERFOOT, Comptroller.

Dear Sir:

Mr. Walker has referred to me your inquiries in regard to the payment of the judges and clerks of election and of the rental of polling places. There are three questions involved:

First. Upon whose warrant should these payments be made?

Second. Can the payments be made out of the general fund, the appropriation of \$50,000 heretofore made by the City Council having been exhausted?

Third. Should the warrants be paid upon presentation by persons other than those to whom they were originally issued?

There are two sources of the warrants for the payment of election purposes. The Election Commissioners and the chief clerk of their board and "all expenses incurred by such Board of Election Commissioners" are to be audited by the county judge, "and such expenditures shall be paid by the City Treasurer, upon the warrant of such County Judge, out of any money in the City Treasury, not otherwise appropriated. It shall also be the duty of the governing authority

of such counties and cities, respectively, to make provisions for the prompt payment of such salaries and expenses, as the case may be." (Section 281, Election Act, 1899.) Under these "expenses incurred" would no doubt, be included amounts payable by way of rental for polling places. On the other hand, in the case of judges and clerks of election, Section 286 of the same act provides that:

"Said Board of Election Commissioners shall audit all the claims of judges and clerks of election, and shall draw a warrant therefor upon said city or county treasury, as the case may be."

All warrants for rentals must, therefore, come from the county judge; those for payment of clerks and judges from the Board of Election Commissioners.

As to the second point: I see no reason why the payment of the rentals should not be made out of the general fund. The statute providing for an annual appropriation ordinance may perhaps be taken, if considered by itself, as covering election expenses; but the election act is explicit as to the payment of the salaries of the election commissioners, their chief clerk and all expenses incurred by them. I have quoted above the part of the statute bearing upon this. The payment is to be made "out of any money in the city treasury, not otherwise appropriated." If this is at variance with the act regarding an annual appropriation ordinance, the latter, as the earlier act and the one less specific in its terms, must give way.

As to the judges and clerks, however, the question is different. The mode of paying them is set forth in Sections 284 and 286 of the Election Act. There is a general direction that they shall be paid; but nothing is provided as to the mode of the payment or the fund whence it shall come. The authorization in Section 281 to pay out of any money not otherwise appropriated, refers only to the salaries and expenditures provided for in Section 281. Under these circumstances I think no one could go so far as to say that if these payments were made out of the general fund, there would be no technical liability.

This view is borne out by the dictum of the Supreme Court in,

Schiel v. Cook County, 137 Ill. 46.

The facts in that case are not in point, inasmuch as the question directly decided was, whether the county or city under the election act was liable to pay the judges and clerks at *primary* elections. It was claimed that if the county was not liable, then the *per diem* of the judges and clerks at primary elections should be paid by the city, the contention being based upon the provisions of the act that "all expenses incurred by said Board of Election Commissioners shall be paid by such city." The court held that the payment of judges and clerks, not necessarily at primaries only but also at regular elections, was not to be considered as an "expense" under the earlier section. If the point of distinction raised by your inquiry is not directly passed on by the Supreme Court in this case, it is missed so narrowly that I could not consider it safe to follow any course contrary to the intimations therein contained.

In regard to the third matter: I consider the policy of paying these warrants in the hands of persons other than those to whom they were originally issued, undoubtedly dangerous. The warrants have been directly held to be non-negotiable and to be little more than vouchers for the comptroller's convenience. The fact of paying an original warrant would be no protection against a duplicate if the duplicate were the warrant entitled to be paid. In all these cases the precaution should be taken of only accepting such warrants as contain the authenticated signature of the original holder.

Yours truly,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JULY 6, 1899.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

In reply to your letter of the 19th inst., asking the Corporation Counsel, to institute legal proceedings against certain street railroad companies on account of their failure to clean and repair certain streets, will say the question of compelling the companies to repair the portions of the streets occupied by them is quite different from that of compelling them to clean them. In the latter case the penalty provided by the ordinances seems adequate, but in the former nothing is provided except the general penalty of \$50 for each offense. It is therefore clear that if the companies are to be compelled to repair or to pay the expense of repairing, it must be done in some way other than by enforcing this totally inadequate penalty.

The special ordinances of the city under which the different companies are operated, expressly provide that they shall keep the portion of the street between the two outermost rails "in good condition and repair." That the acceptance of the grant by the operation of the street railway creates a binding legal obligation on the company to carry out this condition is too plain to need any demonstration and is abundantly supported by the authorities.

Rockford City Railway Co. v. Matthews, 50 Ill. App. 272.

The court said at page 272: "If a corporation accepts a grant from the city of the right to use the street in a certain manner and the grant is burdened with a duty which it neglects, the corporation would no doubt be responsible for the consequences of the neglect of that duty . . ."

Byrne v. Chicago General Railway Co., 63 Ill. App. 444.

In this case the charter contained a provision for a license fee. The court in holding that the company was bound by the condition of the grant, said at page 454, "It is enough that the ordinances accepted and acted under make a complete and valid contract with reference to the imposed license fee."

These cases are in line with:

Belleville v. Railway Company, 152 Ill. 189.

It necessarily follows that as there is a binding legal obligation on the companies to repair, the measure of damages for a failure to repair, must, as in any other case of breach of contract, include any expense to which the other party is put by reason of such failure. Thus it is held that if a judgment is recovered against the city, it may in turn recover from the company.

Brooklyn v. Brooklyn R. R. Co., 47 N. Y. 486.

Woburn v. Henshaw, 101 Mass. 193.

The city may also, on the failure of a company to repair, after due notice has been given, make the repairs itself and recover in an action.

Pennsylvania Railroad Co. v. Duquesne, 46 Penn. St. 223.

This was an action by the borough to recover the cost of repairing a bridge; at page 228 the court laid down the broad principle that "whenever any person or corporation is bound to repair a public highway and refuses to do so when necessary, on notice from the proper officers having general oversight thereof, those officers may repair and recover the proper expense thereof in an action of assumpsit." This decision was affirmed in the case of:

Newlin v. Davis, 77 Penn. St. 320.

Oconto v. C. & N. W. R. R. Co., 44 Wis. 238.

In the latter case the commissioners made the repairs and the city recovered from the company. The court held that this was within the general power of the commissioners "to make or cause to be made, all necessary repairs to any street," etc.

If it seems desirable to have the city repair the streets and then bring suit, care must be taken to preserve evidence of the condition of each place where repairs are to be made, and also of the exact amount it costs the city to put such places in proper condition.

As most of the special ordinances require the companies to repair in accordance with the orders of the City Council, it would be well to have an order passed by the City Council, ordering the Commissioner of Public Works to send notices to the different companies to put their portions of the streets

occupied by them in repair, and in the event of their failure to do so within a certain time, to proceed to repair them himself at their expense.

Very truly yours,

CLARENCE N. GOODWIN,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

AUGUST 11, 1899.

MR. ROBT. LINDBLOM, President Civil Service Commission.

Dear Sir:

The Corporation Counsel has referred to me your recent favors in which you ask for an opinion whether the examiners of the Civil Service Commission are included within the operation of the law.

After directing the mode in which examinations shall be conducted the Civil Service Act expressly provides for the services of examiners in the following extract from Section 6:

“The Commission shall control all examinations, and may, whenever an examination is to take place, designate a suitable number of persons, either in or not in the official service of the city, to be examiners, and it shall be the duty of such examiners, and if, in the official service, it shall be a part of their official duty, without extra compensation, to conduct such examination as the Commission may direct, and to make return or report thereof to said Commission, and the Commission may at any time substitute any other person, whether or not in such service, in the place of any one so selected; and the Commission may themselves at any time act as such examiners, and without appointing examiners.”

The rules of the commission promulgated as of December 31, 1898, enumerate among the other employes of the Civil Service Commission, one assistant chief examiner, six examiners of examinations and papers, one chief examiner of pay rolls and four assistants, one “examiner and stenographer”, and two “special examiners of applications.” There are only

three other employes in the classification. These are—two certification clerks and one messenger. Now, Section 6 of the act, in using the word “examiners” means thereby to indicate a person who conducts the examinations provided for in the earlier part of the same section—that is, one who sets questions, obtains answers thereto, marks papers, ascertains the relative standing of candidates or does any other thing connected with the holding of such examinations. An employe who examines pay rolls, to pass upon their correctness, etc., is certainly not an “examiner” in the sense in which the word is used in the sixth section. This also applies to “special examiners of applications” if their duties lie with other work than that which relates directly to the examinations mentioned in Section 6. As to the position of “examiner and stenographer”, in like manner the test would be the actual duties of the employe. This is in strict accordance with Section 6 of Rule V (1898 Report of Commission, p. 75), that “the duties of the position to be filled, rather than the name by which it is called, shall be considered.”

Who then are the “examiners” provided for in Section 6 of the act? Are these examiners the only ones contemplated by the act? In the answers to these questions will be found a sufficient answer to your query. The conclusion at which I have arrived is not in detail supported by previous opinions of this department; although regarding the particular class of employes mentioned in Section 6, the result is practically the same. I assume that the word “examiners” as used in this section of the act is intended to convey the meaning already suggested,—that is—it covers employes who are directly concerned with the conduct of examinations of candidates for offices and places of employment in the classified service. But it is apparent that there is a further restriction to be made. That part of Section 6 quoted refers only to *special* designated examiners. It gives power to the Commission to designate persons to conduct any examination. These persons may or may not be in the official service of the city. The compensation, if the examiner is taken from without the service, is fixed by Section 18 of the act, at the rate of five dollars a day for every day actually

and necessarily spent in the discharge of this duty. These are mere temporary appointments at the discretion of the Commission. It is immaterial whether the examiner designated comes from within or without the official service. In no proper sense can he be said in either case to occupy one of the "offices" or "places of employment" covered by the provisions of the act. If the examiner is already in the official service, his performance of the additional duties laid upon him by the act and the designation of the commissioners does not affect his previous position in the service. His position after the examination has been concluded is the same as it was before, neither more nor less. He has merely performed a duty lying outside his ordinary duties—but which, nevertheless, is equally a part of his employment. As to the examiner designated from without the official service no stretch of inference can make him occupy a place in the official service during the time of the examination. The employment is casual. By its nature and, one may say, by the clear intent of Section 6, the employment has no duration beyond the event which called it into existence. One would hardly argue seriously that the provisions of Section 12, as to the removal of officers or employes in the classified civil service, referred to these designated examiners. The elements of permanency, regularity and exclusiveness of employment which must exist before a position lies within the official service subject to the provisions of the act are all wanting here.

I conclude, therefore, that the class of "designated" examiners mentioned in Section 6, are not within the provisions of the act as to the mode of their removal.

May there not, however, be other "examiners" of candidates for offices who do come within the provisions of the act so that they may only be appointed originally in accordance with the provisions of Section 10, and may only be removed in accordance with the provisions of Section 12? This depends, perhaps entirely, upon whether the provisions of Section 6, quoted above, are exclusive in effect. I mean by this that if the mode of designation of examiners therein provided is the only mode open to the commission, the position of no examiner of candidates is within the act. To accom-

plish this construction of the clause the words "may . . . designate a suitable number of persons" will have to be read "must designate", etc. The rule that the direction in a statute of one method is a denial of other methods must be rigidly applied. This is, of course, a most familiar rule—of frequent, but by no means of invariable application. It is to be remembered in the first place that while "may" and "must" are often held to be exchangeable just as are "and" and "or", a certain presumption, not without weight, in favor of the ordinary meaning of the word used is raised by the fact of its use. When "may" is used there must be found good reasons from the immediate or general context to warrant its rendering into "must." Of course, if the ordinary reading makes a provision ambiguous, or sets it in conflict with other provisions, or with the general purposes of the act, the rule alluded to may be freely used. But this is not a case of that kind. If the clause under discussion means the grant of a mere discretion to the commissioners to designate special examiners at any examinations, it is hard to see how such a construction interferes in any way with the particular or the general objects of the act. On the contrary, it seems more reasonable to believe that the legislature gave this discretion to the commissioners as a material aid to the better accomplishment of their duties. In practice occasions might arise when the permanent staff of examiners might be, without any discredit, not wholly fitted to serve. In examinations for positions requiring technical knowledge or skill this might readily occur. It is clear that without the authority of Section 6 no such designation could be made by the commissioners. It is also doubtful whether the assistance of voluntary examiners would be permissible. At all events there is nothing strained in a construction which suggests that the legislature may have foreseen these difficulties and sought to obviate them by the provision relating to specially designated examiners. Furthermore, I find nothing in the act which makes against the existence of permanent positions classified under the official service, the duties of which consist in preparing for, conducting, passing upon and reporting the results of examinations. The supervision

of examinations is one of the most important of the commission's duties. Upon examinations and their results the act itself stands. Were this given over in every case to the care of persons casually employed for the particular examination great inconvenience and irregularity might easily follow. The provision that "the commission may at any time substitute any other person, whether or not in such service, in the place of any one so selected" cannot be said to contemplate a system of examinations conducted by the specially designated examiners and by no others. It is rather a further grant of discretion, the result of which is to give the commissioners an entirely free hand in the management of examinations. To make away with the inconvenience of examinations conducted by a permanent body of examiners Section 6 provides for the specially designated examiners. To make this alternative mode of the greater efficiency the commission is given ample power of substitution. The same line of argument applies to the clause that "the commission may themselves at any time act as such examiners, and without appointing examiners." To read into this clause a hidden prohibition against permanent examiners would be to put phrases between the lines which do not appear in the lines themselves. I am of the opinion, for the reasons given, that among the employes of the Commission may be included examiners of candidates not designated under the provisions of Section 6, and that these employes are occupants of positions in the official service of the city and subject to the provisions of the civil service act as to the modes of their appointment and removal.

Very truly yours,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

SEPTEMBER 4, 1899.

MR. F. X. BRANDECKER, JR., City Collector.

Dear Sir:

I herewith return a letter addressed to you, signed by

James H. May of your office, which accompanies a verbal request from Mr. May asking this department if, under the present ordinance in relation to the licensing of insurance brokers, he would be justified in exacting a broker's license from those who as solicitors represent the agents of the insurance companies, and not the companies themselves, and receive a commission on all the business they secure, and receive no other pay or compensation excepting such as is received by them as commission. This in turn presents the question, Who are comprised in the term "insurance broker?"

Section 216 of the Revised Code defines an insurance broker, and by its terms includes all such persons mentioned in your request. It reads as follows:

"An insurance broker, within the meaning and intent of this chapter, shall include any and every person, firm, corporation or association engaged in soliciting, procuring or placing, for a consideration received, or to be received, insurance on lives, or on buildings, vessels or other property, either directly or through any other broker or through any insurance agent in or with any insurance company or association other than an insurance company or association of which such person, firm, corporation or association soliciting, procuring or placing the insurance in any case shall be the duly authorized agent."

By the terms of this section of the ordinance you will see that the City Council has defined what is intended by the term "insurance broker." The courts have heretofore passed upon this question and construed the meaning of these words as used in the ordinance. In the case of *East St. Louis v. Brenner*, 59 Ill. App. 604, the court considers and discusses most of the Illinois cases bearing upon this question. The court said:

"An insurance broker 'is the middle man, and for some purposes is treated as the agent of both parties.' Both parties, in such case, may without relation to each other, place their business in his hands, with, it may be, conditioned terms, as with right of inspection or approval, etc.

"The business of a 'broker' is to represent all parties,

buyers or sellers, in his line. His business, as a business, is not to represent simply one person or company."

It was evidently to comply with the rulings of the court that the Council defined their meaning in this ordinance. It is a difficult matter to definitely state all who are within the purview of this ordinance and those that are not. The facts in each particular case will govern in determining who are included by the term, but the courts and the ordinance have stated that agents, solicitors and representatives of one particular company or person are not "brokers." The weight of authority seems to define an "insurance broker" as an independent character, representing no single company as their agent, and when transacting business, acts, so far as possible, as the agent of both parties. I would say further, that where you find a person who is not the duly authorized agent of any company or employe thereof, who is doing an insurance business, who is obtaining and placing insurance, and receiving, as you state, a commission on the business secured, he would be considered within, and subject to the terms of the ordinance.

Very truly yours,

D. E. SULLIVAN,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

OCTOBER 11, 1899.

MR. WALTER C. NELSON, Alderman, Thirty-second Ward.

Dear Sir:

Your request for an opinion as to the authority of the city under its police power to compel the removal from the streets of poles and overhead construction owned, or used by the various private or quasi public corporations, such as telegraph, telephone, and electric light companies, etc., has been referred to me.

There is no doubt that the city can, in the exercise of its police power, compel any person or corporation owning or using, for the conduct of his or its business, poles or wires

or any similar construction along or upon the public streets, to remove same from the public streets and place the wires in underground conduits; and that too, notwithstanding the fact that such person or corporation may have erected such poles by virtue of authority given by an ordinance of the city, and although the term of years named in said ordinance may not have expired.

This question has been repeatedly litigated in various States; and the courts have universally sustained the right of the municipality to exercise its police powers in the manner suggested by you.

In the City of New York, the various telegraph companies, doing business, as they do in our own city, under federal authority and without city ordinance, were compelled to remove all overhead construction and place their wires underground, in compliance with an ordinance of the city; the courts of the City of New York, as well as the Supreme Court of the United States, holding that the direction to adopt underground construction and remove all poles from the streets was a valid and reasonable exercise of the police power vested in the municipality.

In the case of the *American Rapid Telegraph Company v. Jacob Hess, et al.*, reported in 13 L. R. A., 454, the New York Court of Appeals used the following language:

“Granting a telegraph company the franchise to construct its line upon and along the city streets will not be construed as an abdication of the police powers over such streets; but if the poles and wires become a serious obstruction or nuisance therein, provision may be made for their removal; and for that purpose the company may lawfully be directed to place its wires underground, commissioners may be appointed to see that the work is done; and if, after due notice, they are not removed, they may be cut down.”

American Rapid Telegraph Co. v. Jacob Hess, et al., 13 L. R. A., 454.

The only restriction the city would be subjected to in the exercise of its police powers in the manner suggested by you, and all that the courts would require to be shown, in order to support and sustain the exercise of such police

power, would be that it was reasonable and was exercised bona fide.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

OCTOBER 17, 1899.

MR. WILLIAM D. KERFOOT, Comptroller.

Dear Sir:

In reply to your letter of the 3d inst., addressed to the Corporation Counsel, inquiring whether the State Pawnors' Society could, under its charter and by-laws, advance money to city employes on their monthly wages or salary, I beg leave to say that there seems to be no reason why they should not. The title of the act providing for the incorporation of such societies is as follows: "An Act to provide for the incorporation, management and regulation of Pawnors' Societies and limiting the rate of compensation to be paid for advances, storage and insurance on books and pledges *and to allow the loaning of money upon personal property*. Section 3 says " . . . it may make advances on all goods, *chattels* and saving bank deposit books offered embraced within its rules and regulations . . ."

Section 15. Any corporation organized under this act shall have no banking power whether of issue, deposit or discount and shall not receive deposits of money or negotiable securities nor loan money on commercial paper, note, check, drafts or other negotiable instruments.

Mr. Dunlap Smith informs me that there are no rules and regulations of the society, except the by-laws. The only article of the by-laws of this society which has any bearing on the question is Article 2, which is as follows: "Its objects are to aid such persons as the society shall deem in need of pecuniary assistance by loans of money at interest upon the pledge of *personal property*."

The claim of an employe for salary is a chose in action

and consequently a personal chattel and *personal property*. Therefore to advance money on monthly wages or salaries would be a "loan of money upon personal property", or to "make advances on . . . chattels . . ."

Such assignments do not come within the prohibition of Section 15 of the act because they cannot be classed as commercial paper, notes, checks or *other negotiable commercial instruments*, since they are in neither a legal nor business sense negotiable, as the title to the chose in action remains in the assignor.

Very truly yours,
CLARENCE N. GOODWIN,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

OCTOBER 20, 1899.

FRANK I. BENNETT, ESQ.,

Chairman Judiciary Committee of the City Council.

Dear Sir:

The enclosed ordinance in the matter of compelling the laying of service supply connections upon streets or alleys at the same time the main pipes or wires are laid and before the pavements are laid down, has been referred to me by the Corporation Counsel for an opinion as to its validity.

The charter powers concerning streets vested by the legislature in the council are the following:

"7. To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues."

"9. To regulate the use of same.

"10. To prevent and remove any encroachments or obstructions upon same."

"13. To regulate the openings therein for the laying of gas or water mains and pipes."

Revised Code of Chicago (1897), p. 509. The council, furthermore, is given power:

"66. . . . To pass and enforce all necessary police ordinances."

“78. To do all acts, make all regulations which are necessary or expedient for the promotion of health or the suppression of disease.”

Revised Code of Chicago (1897), p. 513.

The tearing up of the streets for laying service supply connections therein causes their obstruction, injury to the pavements, danger to life and limb, general inconvenience, and insanitary conditions which lead to and spread typhoid fever, diphtheria and other diseases. Any reasonable measure, therefore, passed by the City Council, such as the proposed ordinance, which will lessen this evil may, I think, be sustained under the charter powers mentioned above.

No matter what rights any gas or other company may have under its charter or any ordinance to operate in the streets of Chicago, those rights are subject to the police power of the city. In *Beer Company v. Massachusetts*, 97 U. S., 25 (p. 33), the Supreme Court of the United States said:

“Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens. . . . The legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, ‘*Salus populi suprema lex est*’; and they are to be obtained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself.”

Beer Co. v. Mass., 97 U. S. 25.

In *Northwestern Fertilizing Company v. Hyde Park*, 70 Ill. 634 (p. 644), the Supreme Court of the State of Illinois said:

“All persons possess their rights, whether to things tangible or intangible, subject to the general police powers of the State, and . . . corporate bodies are not, nor can they be, a privileged class in this regard.”

Northwestern Fertilizing Co. v. Hyde Park, 70 Ill. 634.

It is well settled that the legislature may delegate its

powers in such matters to a municipality established under the State laws.

I am therefore of the opinion that the proposed ordinance is, in substance, valid; but I beg leave to suggest that the draft of the ordinance prepared by the law department, which is also enclosed herewith, be substituted for the ordinance which is now before your honorable committee.

Yours respectfully,

ROSWELL B. MASON,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

OCTOBER 30, 1899.

TO THE HONORABLE THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

In compliance with the order passed by your honorable body at its regular meeting October 15, 1899, printed on page 1296 of the current council proceedings, and supplemented and made definite by a letter from Ald. Cullerton, who introduced the order, I beg leave to submit the following opinion as to the power of the City Council to "compel the street railway company, operating upon the streets of the west division of the City of Chicago under an ordinance passed March 30, 1888, as the successor of the Chicago West Division Railway Company," to give better service in the matters of the running of cars and giving of transfers.

Section 10 of said ordinance is, as quoted in your order, as follows:

"Unless otherwise provided in this ordinance, the privileges hereby granted are subject to all the general ordinances of the City of Chicago now in force, *or which may hereafter be passed*, in reference to street railways."

The company accepted the ordinance including said Section 10, and although there is no doubt in my mind as to either the force of said section, or its applicability to the case in question, nevertheless, I have not considered the section wholly indispensable in arriving at my conclusions.

Among the powers of the City Council, under the pres-

ent charter, the following are contained in Article V, Paragraph 62:

“Clause 42. To license, tax, and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation;” and in the much quoted case of *Allerton v. City of Chicago*, 9 Bissell, 552, Judge Drummond held that this clause applied to street railway companies because they were among the “others pursuing like occupations”.

In addition to the general police powers conferred by the charter, Section 4 of the street railroads act, further specifically provides that:

“Every grant to any such company of a right to use any street, alley, road, highway, or public ground, shall be subject to the right of the proper authorities to control the use, improvement, and repair of such street, alley, road, highway, or public ground, to the same extent as if no such grant had been made, and to make all necessary police regulations concerning the management and operation of such railway, whether such right is reserved in the grant or not.”

Laws of Illinois, 1899, p. 332.

The Supreme Court of this State construes the city's police powers broadly. For instance, it has said in one case

“That (i. e., police power of a municipal corporation) may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances, and regulations as pertain to the comfort, safety, health, convenience, good order, and welfare of the public.”

Culver v. City of Streator, 130 Ill. 238.

In a more recent case it says that a street railway company is invested with corporate life and granted corporate powers to enable it to serve the public as a public carrier of passengers. Its property is impressed with a public use and it must exercise its powers for the benefit of the public. It is not a private but a quasi-public corporation.

People v. Suburban R. R. Co., 178 Ill. 504.

Consequently, having in view the powers conferred by the State, and the construction placed upon them by the

courts, and bearing in mind said Section 10 of the ordinance mentioned, so far as it may be useful, I am of the opinion that the City Council may, by a general ordinance in reference to street railways, provided it be reasonable in its terms and requirements, compel the street railway company operating in the West Division of the City of Chicago, under the said ordinance of March 30, 1888, as successor of the Chicago West Division Railway Company, to run cars sufficient in number and at times to meet the needs of the traveling public.

The question of compelling the street car companies to furnish adequate transfer service has been heretofore passed upon by the department. Judge Hutchinson, when Corporation Counsel, in an opinion printed on page 1107 of the Council Proceedings of 1890-91, and later, Mr. Thornton, in an opinion printed on page 219 of the Council Proceedings for 1898-99, have both expressed themselves in favor of the position that the council has full powers in this respect. I have carefully examined the authorities cited by them, and also the later decisions of the courts bearing upon the same question, and see no reason to dissent from the conclusions formerly reached by this department.

I am therefore, of the opinion that the council may, by a general ordinance, compel the said street railway company to provide transfer service in the West Division of the city reasonably adequate to the public needs.

Respectfully submitted,

CHARLES M. WALKER,
Corporation Counsel.

NOVEMBER 17, 1899.

MR. F. X. BRANDECKER, JR., City Collector.

Dear Sir:

Your letter of the 11th inst., in regard to bringing into effect in the Town of Austin those ordinances that are now in force in this city regarding the collection of fees, etc., has been referred to me by the Corporation Counsel for an answer.

As the Town of Austin, which was not a separate municipal corporation, but merely a part of Cicero, has been

annexed to the City of Chicago, the jurisdiction of the city has spread over its territory and it has become subject to all the laws of the city. The Legislature, by the annexation act, saved whatever local option and prohibition ordinances were in force in the annexed territory at the time of the annexation (Illinois Statutes, Myers' Ed. 1897, p. 369g); but the very fact that such ordinances were singled out and declared by the Legislature to be operative after annexation shows, I think, that no other ordinances whatever that were formerly in force in the annexed territory have any present effect. I am therefore of the opinion that the ordinances that are now in force in Chicago regarding the collection of fees, etc., apply to the Town of Austin, and that the ordinances that were formerly in effect, except those regarding local option and prohibition districts, are not to be enforced in derogation of the present ordinances of the City of Chicago.

Very respectfully yours,

ROSWELL B. MASON,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

NOVEMBER 17, 1899.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your letter of October 30, 1899, to the Corporation Counsel, in which you ask, "is it optional with the Mayor and Commissioner of Public Works to accept surety companies' bonds where it is not specially provided by the council," etc., has been given to me for answer.

Section 1627 of the Revised Code (1897) provides that:

"In all cases, before the letting of any contract where bonds are required to be taken by the Commissioner of Public Works, the sureties therein shall deposit with said commissioner a statement under oath, showing the real property owned by each surety, the location of the same, its value, and the amount of incumbrance or incumbrances, if any, thereon."

But this matter is controlled by an act of the legislature in force July 1, 1897 (Hurd's Statutes), which provides:

"That whenever any bond, recognizance or other obligation is, by law or by charter, ordinances, rules or regulations of the State or of any municipality, board, body, organization, court, judge or other public officer, required or permitted to be made, given, tendered or filed with surety or sureties, and whenever the performance of any act, duty or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, obligation, recognizance or guaranty may be executed by a surety company qualified as hereinafter provided; and such execution by such company of such bond, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every requirement of every law, charter, ordinance, rule or regulation that such bond, obligation, recognizance or guaranty shall be executed by one surety or by one or more sureties, or that such sureties shall be residents or householders or freeholders, or either, or both, or possess any other qualifications, and such company may be released from its liability on any such obligation on the same terms and conditions as are by law prescribed for the release of personal sureties."

And therefore under the authority of the act above set forth I believe the Mayor and Commissioner of Public Works may accept surety companies' bonds without being specially authorized to do so by the City Council; provided, however, that such companies have complied in every particular with the requirements of the act above set forth as well as the original act (July 1, 1887), of which the act of July 1, 1897, is an amendment. The original act of July 1, 1887, provided that such surety companies "upon production of evidence of solvency and credit satisfactory to the judge, *head of department*, or other officer authorized to approve such bonds, be accepted as surety upon the bond of any person," etc.; and the amendatory act in force July 1, 1897, provides:

"That the Superintendent of Insurance, upon due proof of any such company of its possessing the qualifications in this act specified, shall issue to such company a certificate

setting forth that such company has qualified and is authorized for the ensuing year to do business under this act, which said certificate shall be evidence of such qualification of such company, and of its authorization to become and be accepted as sole surety on all bonds, recognizances and obligations, required or permitted by law or the charter, ordinances, rules or regulations of the State or of any municipality, board, body, organization or public officer, and the solvency and credit of such company for all purposes and its sufficiency as such surety."

And in Section 82 of the act concerning local improvements, in force July 1, 1897, it is provided:

"All contractors, contracting owners included, shall at the time of executing any contract for such public work, execute a bond to the satisfaction and approval of the board of local improvements of said city, village or town, in such sum as the said board shall deem adequate, conditioned for the faithful performance of the contract, and the sureties shall justify, before some person, competent to administer an oath, in double the amount mentioned in said bond over and above all statutory exemptions."

From the above provisions I believe that the Mayor, Commissioner of Public Works and the Board of Local Improvements can exercise their discretion in the selection or rejection of any company as such surety, and that schedules are not necessary to the validity of the bonds, any such provisions in the laws being merely directory to make certain of a good and sufficient bond.

Yours respectfully,

ARMAND F. TEEFY,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

DECEMBER 8, 1899.

WM. E. SCHLAKE, Chairman Finance Committee, City Council.

Dear Sir:

Mr. Barrett's letter of the 8th ult., enclosing one from Mr. Dunlap Smith, in the matter of the license fee to be paid by the Pawnors Society, incorporated under the recent Act of the Legislature, has been referred to me by Mr. Walker for an answer.

The city ordinances require all pawn brokers to take out a license. (See Section 1388, Revised Code of Chicago, 1897 Edition.) Section 1389 of the Revised Code provides:

"Every person or company engaged in the business of receiving property in pledge or as security for money or other thing advanced to the pawnor or pledger shall be held and is hereby declared and defined to be a pawnbroker."

Section 1390 provides:

"Every person receiving such (i. e. a pawnbroker's) license shall pay therefor the sum of \$300 for the use of the city."

There can be no doubt that the word "person" is to be construed as including "corporation." I am therefore of the opinion that the Pawnors Society under the sections of the Code quoted above must pay a license fee of \$300 to the city.

The City Council's power to pass an ordinance reducing the license fee of such an organization to \$50 depends on whether or not such an ordinance would be unjustly discriminative.

"Ordinances must be general in their character and operate equally upon all persons within the municipality of the same class to which the ordinance relates. * * * Ordinances must not unjustly and arbitrarily discriminate between citizens of the same class."

Zanone v. Mound City, 103 Ill. 552 at 556. See also *City of Chicago v. Rumpff*, 45 Ill. 90.

"Ordinances cannot favor or discriminate against any person or class of persons, but must be uniform and of general operation within the corporate limits."

Hibbard, S., B. Co. v. City of Chicago, 173 Ill. 91 at 98.

"A municipal ordinance requiring a license must not discriminate as between persons having equal facilities for profit."

City of East St. Louis v. Wehrung, 46 Ill. 392.

Section 41, Article V., of the Cities and Villages Act, gives the City Council power "to license, tax, regulate, suppress and prohibit . . . pawnbrokers." Under a similar charter power it has been held that the City Council has power to divide persons engaged in the business of keeping livery stables, so far as the exaction of a license fee is concerned, into classes, in accordance with the number of carriages kept for hire.

Howland v. City of Chicago, 108 Ill. 496.

Under the Act of the Legislature for the incorporation of Pawnners' Societies, in force July 1, 1899 (see Laws of Illinois for 1899, p. 112), there is no limit to the number of Pawnners' Societies that may be incorporated in Chicago, although at present there is in existence only one. There are various restraints placed upon them by the terms of this Act, which do not apply to natural persons engaged in the same business. Pawnners' Societies are much more subject to municipal and State control and their facilities for profit are different as they are not allowed to charge more than one per cent per month, while the limit on other pawnbrokers is three per cent per month. I am of the opinion that Pawnners' Societies organized under this Act of the Legislature may reasonably be considered as constituting a distinct class of pawnbrokers and that the City Council has power to exact a smaller license fee from them than from natural persons engaged in the same business.

I enclose herewith a draft of an ordinance prepared in accordance with Mr. Dunlap Smith's request.

Yours respectfully,

ROSWELL B. MASON,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

DECEMBER 27, 1899.

To the Honorable, the City Council of the City of Chicago.
Gentlemen:

In compliance with an order passed by your honorable body at its last regular meeting, directing that the Corporation Counsel report "by what authority the Illinois District Telegraph Company is establishing offices and doing business in the City of Chicago, and also if the Western Union Telegraph Company has the right, under its franchise, to delegate the power to another corporation to use its lines and conduits to transact business, without first obtaining an ordinance from this Council," I beg leave to advise you that I can find no authority from the City of Chicago granting the Illinois District Telegraph Company the right to operate in this city, and in the absence of such a grant, I am of the opinion that they have no legal right to so operate.

The Western Union Telegraph Company does not operate in the City of Chicago by reason of any authority granted to it by the City Council, but has the right to operate here under the authority of an Act of Congress, passed in 1866, which authorizes all telegraph companies which have accepted the provisions of that Act to operate on all post roads in the United States, and a later Act defining every public highway to be a post road. This authority, however, in my opinion does not give the Western Union Telegraph Company the right to delegate any part of this power to another corporation to use its lines and conduits for the transaction of business in this city; and such delegation of power cannot legally be made without a grant from the City Council of the City of Chicago.

Respectfully yours,

CHARLES M. WALKER,
Corporation Counsel.

FEBRUARY 21, 1900.

TO THE HONORABLE, THE CIVIL SERVICE COMMISSIONERS.

Gentlemen:

The Corporation Counsel has referred to me your letter of the 9th inst., in which you ask whether the Superintend-

ent of the Bridewell is a member of the classified service of the city, so as to fall within the operation of the Civil Service Act.

In answer permit me to call your attention to the provisions of the Act of July 1, 1871, establishing Houses of Correction and provisions for their government. This act should be considered with a view to ascertaining whether or not the House of Correction is a "principal department of the city" and whether its Superintendent is a "head" of such principal department. If so, the exception of Section 11 of the Civil Service Act will exclude this official from the classified service of the city.

Special provision is made for the management of Houses of Correction under the Act of 1871 mentioned, sufficient to constitute a House of Correction a department of the city in no wise dependent upon any other department. This I take to be the true test whether a department is a principal or a subordinate department under the Civil Service Act. No matter how small it is in comparison with another department it is, nevertheless, a principal department if it is not included within another department; in other words, if it is a department.

By the Act of 1871 the Superintendent is clearly constituted the head of the House of Correction. Under the terms of the Act he is no sense a deputy. He need obey and carry out the instructions of the inspectors only when they are in writing. Otherwise, he "shall have entire control and management of all its concerns, subject to the authority established by law, and the rules and regulations adopted for its government." Again, in Section 7, "he shall be responsible for the manner in which said House of Correction is managed and conducted. . . . He shall exercise a general supervision and direction in regard to the discipline, police and business of said House of Correction."

In the same section the Act provides for a Deputy Superintendent who is to exercise the powers of the Superintendent in the latter's absence in certain particulars. This fact points to the Superintendent as the head of the department. Moreover, the inspectors serve without compensation and only

meet as a board every three months to examine into the conduct of the department. One of them must visit the House of Correction at least once a month. The duties of these inspectors, it is plain, are supervisory rather than concerned in that actual management and control of a department which is essential to the office of head of a department.

For the reasons given, I am of the opinion that Section 7 of the Act of 1871, relating to the appointment of a Superintendent of a House of Correction by the Mayor, with the consent of the Board of Inspectors, is still in force, and that in consequence the office of Superintendent of the House of Correction does not fall within the classified service of the city.

Very truly yours,
COLIN C. H. FYFFE,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

MARCH 8, 1900.

MR. F. W. BLOCKI, Deputy Commissioner of Public Works.

Dear Sir:

Your letter of the 20th ult., enclosing letters from the City Engineer and the Superintendent of the Water Pipe Extension Bureau, has been referred to me for reply.

You ask what jurisdiction the City of Chicago has over the water power furnished by a private water company in the Town of Austin, whether said company can be compelled to furnish sufficient pressure for water in case of fire, and whether the city can extend its mains into the Town of Austin for the purpose of furnishing water to residents and for fire protection.

The Act of the Legislature, entitled "An Act to enable cities, incorporated towns and villages to contract for a supply of water for public use," provides:

"That in all cities, incorporated towns and villages where waterworks have been, or may hereafter be constructed by any person or incorporated company, the city, town or

village authorities in such cities, incorporated towns and villages, may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years."

Hurd's Revised Statutes of Illinois (1899), p. 310.

On May 25, 1899, the Cicero Water, Gas and Electric Light Company, which is the private water company in question, entered into a contract with the Town of Cicero for a period of twenty-nine years. In this contract it was provided that the Water Company should put in fire hydrants and furnish water for fire protection for a certain annual compensation to be paid therefor by the Town of Cicero, and keep at all times a pressure of water of at least thirty-five pounds per square inch on the water pipes, and in the case of fire the pressure of water should at once be increased to forty pounds on said water pipes. It was further provided that the Water Company should keep its hydrants in repair and ready for use and should keep a supply of water for fire purposes. In case of failure on the part of the company to keep and perform the conditions of the contract for the space of sixty days, then upon sixty days' written notice by the Town of Cicero to said company of such failure and a failure of said company to remedy such defect within sixty days after the service upon it of such notice, the Board of Trustees of said town might, at its election, by resolution terminate the contract. The contract did not grant or attempt to grant any exclusive privileges to the Water Company.

The ordinance of the Town of Cicero under which the Water Company operates and which is mentioned in said contract, was passed November 12, 1897, and provided among other things that the material used for water pipes should conform to the standard given in the rules governing plumbing and plumbers in the City of Chicago. This ordinance further provided that all excavations to be made by the company in laying its pipes should be under the supervision and control of said Board of Trustees of the Town of Cicero.

As the City of Chicago has succeeded, in so far as Austin is concerned, to the rights of the Town of Cicero under said contract, I am of the opinion that the City of Chicago

has the same jurisdiction over the water power furnished by this company in Austin as the Town of Cicero had; and if the Water Company fails to furnish sufficient pressure for water in case of fire or defaults on its contract in any other respect, the City Council has power to order it to make good such default, and in the event of a failure to comply with said order the City Council can annul the contract.

Apart from the contract, the Cicero Water, Gas & Electric Light Company is a quasi-public corporation, and the city can undoubtedly compel it to furnish adequate service for reasonable compensation, inasmuch as one of the objects of its creation was to serve the public.

Rogers Park Water Company v. Fergus, 178 Ill. 571.

In reply to your last question, I am of opinion that there is no legal objection to the city's extending its water mains into the annexed territory.

Respectfully yours,

ROSWELL B. MASON,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

MARCH 20, 1900.

WALTER C. NELSON, Alderman, Thirty-second Ward, City Council.

Dear Sir:

The Corporation Counsel has referred to me your letter of November 18, 1899, in which you state that the Judiciary Committee desires an opinion "in regard to the legality of the slot machine telephones, reference being made especially to an order introduced by Alderman Cullerton, to be found in the Council Proceedings of June 26, 1899, p. 802."

I have considered this question with reference to said order and beg leave to advise you that in my opinion the use of the so-called "slot machine" telephone under the contracts made between the Telephone Company and the various persons in whose stores or places of business such telephones are established, is not in violation of the provisions of the ordi-

nance granted by the City Council to the Chicago Telephone Company, and under the authority of which the said Telephone Company is operating.

I have carefully examined the opinion of former Corporation Counsel Thornton referred to in the order and find myself forced to disagree with his conclusions.

If, as a matter of fact, the Chicago Telephone Company refused to furnish an applicant with a telephone to be used as a public telephone in accordance with the rates established by said Telephone Company as provided in and by Section 6 of its ordinance, and an attempt was made by said Telephone Company to force such an applicant to take one of these slot machine telephones in place thereof, that, in my mind, would be a definite violation of the provisions of the ordinance of January 4, 1889, under which the Telephone Company is operating in the City of Chicago. That ordinance makes no provision whatsoever as to the price to be charged subscribers or users of telephones, other than the provision in Section 6, which is to the effect that:

“The said company during the term for which this ordinance is granted, shall not increase to its present or future subscribers the rates for telephone service now established, and provided also that with the acceptance hereinafter required, there shall be filed by said company a schedule showing the rates charged by said company for telephone service at the date of the passage of this ordinance, within the limits of the City of Chicago.”

In accordance with this provision the Telephone Company filed with its acceptance of this ordinance a schedule showing the rates charged by the Chicago Telephone Company for telephone service on the fourth day of January, 1889, within the limits of the City of Chicago.

In accordance with the provisions of this ordinance, when this schedule was filed by the Telephone Company, the company became bound thereby and could not *increase* the rates for telephone service therein established, to any of its subscribers; and anyone desiring a telephone which may be used by the general public and which is to be located within limits described in the schedule, is rightfully entitled to have

such telephone furnished at a charge of not to exceed one hundred and fifty (\$150) dollars per annum.

This department passed upon this question in 1896 while Mr. William G. Beale was Corporation Counsel, and an opinion was rendered by him November 7, 1896, to the Judiciary Committee. His opinion goes into the question of the legality of the use of the slot machine telephone at great length, and I fully concur with his reasoning and conclusions. The opinion may be found on pp. 320 to 325 of the publication, entitled "Opinions of the Corporation Counsel and Assistants."

Yours very truly,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

APRIL 13, 1900.

MR. JOSEPH KIPLEY, General Superintendent of Police.

Dear Sir:

You asked me a few days ago to give you an opinion concerning the legality of the act of "picketing", as it is called, and to advise you generally of your powers and duties with regard thereto.

You told me your attention had been called to the English case of *Lyons v. Wilkins*, Eng. Chan. Rep. 1899, 255. Upon examination I find that this case was decided with reference to a particular statute making illegal a specific act. We have no such statute and that case is wholly without application here.

"Picketing", as defined by the principal cases dealing with the subject, is "watching and speaking to the workmen as they go to their employment, to induce them to leave the service." Pickets are those who are stationed at or near premises where there has been a "strike" or "lockout", and who besides gathering and conveying to their organization such information as they can obtain by watching, seek to influence other persons against working in those premises.

There is a number of recent cases in which "picketing" is discussed. While they are not all, strictly speaking, police cases, they are, nevertheless, of value in connection with the consideration of this subject.

In the case of *Fraser & Chalmers v. Iron Moulders' Union*, Vol. 31, No. 51, Chicago Legal News, Judge Windes in a well considered decision held that acts of peaceful persuasion were not in themselves unlawful, but that:

"Persuasion in the smoothest of words or in the blandest of manner, accompanied by a great show or congregation of numbers, or by intonations of voice indicative of threats or ridicule, which have a most vindictive purpose, might well be denominated intimidation."

In holding that "picketing" by peaceful persuasion was proper, this order limited the number of men who might picket in this manner at the particular place in question to ten.

In the case of *Bush & Gertz Piano Company v. Holst, et al.*, Chicago Law Journal, September 15, 1899, p. 402, Judge Dunne, said:

"Defendants have the right to congregate at or near complainant's premises upon the public thoroughfares, provided they are there for a peaceful and lawful purpose and do not unduly obstruct the thoroughfares, or unfairly by violence or intimidation interfere with complainant's conduct of its business. They have also the right to establish a picket line upon the public thoroughfare for legitimate purposes, such as that of informing all persons seeking employment that a 'strike' is in progress, and advising them or entreating them not to go to work."

In a New York case frequently cited on this subject the court said that workmen ". . . may co-operate to improve their condition and increase their wages, they may refuse to work for less than the price they have jointly fixed, and they may do everything which is lawful and peaceful to secure that price. They may even go to their brethren and beseech them not to work for less than the fixed rate. Argument, reasoning and entreaty are legal weapons; but the moment they go be-

yond those means and threaten to punish with violence they bring themselves face to face with the law.”

People v. Kostka, 4 N. Y. Crim., 435.

In another New York case, Chief Justice McAdam said that:

“The plaintiff has the legal right to decline to work for his employer unless the latter consented to pay the wages the former demanded; that he had the right to invite others to join him in the course he had determined to pursue, to accost workmen in the street or elsewhere, and invite them to follow his example or join the union, and if in the exercise of those rights he was wrongfully assaulted and maltreated by the defendant he is entitled to a verdict in such sum as will compensate him for the wrong done. But if he undertook to enforce his rights in an illegal manner, used violence, or threatened workmen who declined to think and act as he did, the defendant had the right, as a police officer, by arrest to protect the workmen so threatened.”

18 Cent. Law Journal, 200.

I believe that the above mentioned cases substantially embody the law on this subject. It must be remembered, however, that even when men are “picketing” peacefully and by persuasion they must not do so in numbers sufficient to intimidate. Your duty is made plain by the statutes of the State and the ordinances of the city. By the city’s charter all policemen are made conservators of the peace and have power to arrest with or without process all persons who are breaking the peace or may be found violating any ordinances of the city. The State law also makes it the duty of every policeman “when any criminal offense or breach of the peace is committed or attempted in his presence to apprehend the offender,” etc. (Criminal Code, Sec. 340.)

“An arrest may be made . . . without warrant . . . by an officer when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.” (Criminal Code, Sec. 342.)

Section 62 of the charter gives the City Council the

power "to prescribe the duties and powers of the Superintendent of Police, policemen and watchmen."

By virtue of this power the council has by ordinance prescribed that the Superintendent of Police "shall devote his whole time to the municipal affairs of the City of Chicago, to preserve the peace, order, safety, etc., thereof." (Revised Code, Sec. 1484.)

"He shall be charged with the duty of protecting the rights of persons and property, etc. . . . and causing to be enforced all ordinances of the city." (Same, Sec. 1485.)

All policemen have practically the same duties and "the power to arrest all persons in the city found in the act of violating any law or ordinance or aiding or abetting in such violation." (Same, Secs. 1508 and 1509.)

It is, of course, unnecessary for me to call to your attention the various laws and ordinances defining the several kinds of "assaults", "intimidation of workmen", "malicious mischief", "riots", "routs", "affrays", "unlawful assemblies", and "disorderly conduct", of "persons collecting in crowds", and other offenses against the peace and order of the city, further than to say that no one, whether he be said to be "picketing" or not, may transgress any of them without becoming subject to arrest and punishment.

I think it goes without saying that the Constitution of this State in giving to its citizens "life, liberty and the pursuit of happiness" means among other things, that every man who wants to strike, has a right to strike, and that every man who wants to work has a right to work.

Any kind of "picketing" that works against this principle to the extent of transgressing any law or ordinance is illegal.

It remains, therefore, your duty to protect persons in their lives and property, to see that the peace is preserved always and everywhere within the city, and the thoroughfares kept open and free to traffic and the public convenience.

Yours very truly,

CHARLES M. WALKER,
Corporation Counsel.

MAY 23, 1900.

TO THE COMMITTEE ON RAILROADS:

Gentlemen:

In response to your request for an opinion as to the right of the City Council to enforce better service on the part of the Lake Street Elevated Railroad Company, as prayed in a petition to the City Council, signed by certain patrons of that company, the following is submitted:

The City Council has the power to compel the Lake Street Elevated Railroad Company to run trains over its road as frequently as public convenience may require. The power may be exercised by ordinance, fixing a time schedule, and declaring that a violation of the ordinance shall subject the company to a prescribed penalty. The ordinance must be reasonable. The reasonableness of such an ordinance cannot be controlled by considerations of expense or profit to the company, but must be controlled almost exclusively by considerations of the needs of the public. Obviously it would not be reasonable to require said company to run a train every second.

Under the Constitution and Statutes of the State, no railroad company can use the streets of the city as a roadway, without the consent of the City Council. In giving its consent to such use of the streets of the city, the City Council has the power to impose on the railroad company such terms and conditions, not inconsistent with established principles of law, as it deems best for the interest of the public. When the City Council gave its consent to the occupation of Lake and other streets, by the Lake Street Elevated Railroad Company, the council exercised its power to impose terms and conditions by reserving to itself, in the ordinance giving such consent, the right and power to regulate the frequency at which said company should run its trains. That condition contravenes no principle of law, and is binding upon said company.

It necessarily follows, then, that if the needs of the public require said company to run trains either during the day time or during the night time more frequently than it is now

doing, the council may prescribe a reasonable time schedule for said company.

Under Statutes and Ordinances very similar in terms to the Statutes and Ordinances under which the Lake Street Elevated Railroad Company is operating its road, the court of Appeals of the State of New York decided, that the Common Council of the City of New York had the right to require certain street surface railroad companies in that city to run their cars "as frequently as public convenience may require, and not less than one car every twenty minutes between the hours of twelve, midnight, and six o'clock A. M., each and every day, both ways, for the transportation of passengers."

For the convenience of the Committee, the provisions of the Constitution, Statutes and Ordinances under which the Lake Street Elevated Railroad Company is operating, are set forth in an exhibit.

Very respectfully,

HENRY SCHOFIELD,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

MAY 25, 1900.

MR. P. F. DOYLE, President of the Board of Examining Engineers.

Dear Sir:

In reply to your letter addressed to the Corporation Counsel, requesting advice on the following questions, I beg to advise you:

Question 1. Shall examinations, held by your board, of applicants for engineer's licenses, be oral or written?

Answer. After the applicant has filled out the printed blanks, furnished by the board on applications for licenses, the rest of the examination may be oral or written, within the discretion of a majority of the board.

Question 2. Does the law require that two members of

the board shall personally make the examination of applicants?

Answer. Under the ordinance, at least a majority of the board shall conduct the examination of applicants.

Question 3. Has the board power to file applications pending an investigation by the board of the truthfulness thereof?

Answer. The board may file applications for a reasonable period for the purpose of investigation.

Question 4. Has a machinist, inexperienced in the construction of boilers and their operation under pressure, a right to an examination?

Answer. The ordinance requires that all applicants must be either machinists or engineers and have at least two years' practice in the management, operation or construction of steam engines and boilers.

Question 5. Has the board the right to require all applicants to furnish further proof of competency than that contained in the application papers?

Answer. The board has such power.

Question 6. Can the board compel the verification by applicants of their statements?

Answer. The board has the power to adopt a rule to that effect.

Question 7. Is it necessary that an applicant should be a resident of the City of Chicago in order to qualify him for a license?

Answer. It is not necessary that an applicant should be a resident of the city. He must be 21 years of age and a citizen of the United States, or have declared his intention to become such.

Question 8. Does absence from duty on the part of an engineer give the right to any member of the board to confiscate the engineer's license displayed in the engine room?

Answer. No.

Question 9. Is failure on the part of a licensee to notify the board of his leaving the employ of any person, firm or corporation, neglect of duty within the terms of Section 1927 of the ordinance?

Answer. No.

Question 10. Has the board the right to compel the owner or agent of a steam plant, being operated by an unlicensed engineer, to cease operating the same until such time as a licensed engineer takes charge of such plant?

Answer. No.

Question 11. Does a failure to display the license in the engine room subject the offender to the penalties prescribed in Sections 1927 and 1931?

Answer. Failure to display the license may subject the offender to suspension or revocation after the accused has been given an opportunity to be heard in his own defense, under Section 1927.

Question 12. Would there be any liability attaching to members of the board, or the board, if such members, or the board, notified the employers of applicants of failure on the part of applicants to pass the examination provided for in the ordinance?

Answer. In my opinion there would be no such liability attaching.

Question 13. Do all stationary engineers in the service of the municipality come under the provisions of the law?

Answer. All engineers in the employ of the city operating boilers carrying more than 10 pounds pressure of steam to the square inch, are subject to the provisions of the law.

Question 14. Has the board the power to compel a new examination of a licensed engineer when such licensee transfers his services from one employer to another?

Answer. No.

Question 15. May the board demand the return of each old license, at its expiration, before the issuance of a new license by the board?

Answer. No.

Question 16. Must the inspectors employed by the board be under oath?

Answer. No; but the board might adopt a rule requiring the same.

Question 17. Does the law require an engineer to renew

his license at the expiration of the term for which it was issued; and, on a failure to make such renewal, is he subject to the penalties provided in Section 1927 and 1931 of the ordinance?

Answer. The certificate is issued under the terms of the ordinance for one year; if the engineer continues to practice his vocation, at the expiration of the license he must secure a new one, under the terms of the ordinance.

Question 18. Can the board compel applicants to pay to the city, license fees for the years, since the passage of the ordinance, during which said applicants have practiced their vocation without obtaining a license under the ordinance?

Answer. No.

Question 19. Can the board compel an applicant to incorporate in his application papers the dimensions of the boilers and steam engines at the last steam plant at which applicant worked?

Answer. The board has the power to adopt a rule requiring it.

Respectfully yours,

W. H. FITZGERALD,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JUNE 6, 1900.

CHARLES ALLING, ESQ., Alderman, Third Ward.

Dear Sir:

I hereby acknowledge receipt of your letter, in which you request an investigation and report as to the procedure under the Act entitled "An Act to provide additional means for the construction of sidewalks in cities, towns and villages," (commonly called the Sidewalk Act) and also an opinion as to the advisability of building sidewalks, and especially small pieces of sidewalk, under said Act, and now submit the following to you in reply:

This Sidewalk Act was before the Supreme Court in a

case which arose prior to the passage of the Local Improvement Act in 1897, and the court there said that the Sidewalk Act is complete in itself, and that procedure under this Act could not be combined with procedure under the existing Act for constructing local improvements by special assessment, and that cities could not proceed partly under one and partly under the other. The Local Improvements Act of 1897 expressly provides that nothing therein contained shall be construed to repeal the said Sidewalk Act. Consequently it may be said now, that in the enforcement of the Sidewalk Act, cities do not have to, and cannot, look outside its terms and provisions for directions how to proceed, and in constructing sidewalks must proceed entirely under the Sidewalk Act, or entirely under the Local Improvement Act, and cannot proceed partly under one Act and partly under the other. See *People v. Yancey*, 167 Ill. 255. So much of the Third Section of the Sidewalk Act as authorizes the cost of the sidewalk to be recovered of the owners of the contiguous lots by action at law, and so much of the same section as authorizes the seizure, by warrant issued by the City Clerk, of the personal property of such owners in satisfaction of the special tax, were held to be in conflict with the Constitution, and therefore void. In *Craw v. The Village of Tolono*, 96 Ill. 255: (Followed in *City of Virginia v. Hall*, 96 Ill. 273, and *Shepherd v. The City of Sullivan*, 166 Ill. 78.) This decision impaired somewhat, and perhaps considerably, but certainly not wholly, the efficiency of the Act to accomplish the intended purpose of the Legislature, namely, to provide a less cumbersome and less expensive method of constructing sidewalks. All the remaining provisions of the Act have been held to be constitutional (*White v. The People* 94 Ill. 64), and hence are valid and are now in full force and effect.

From the foregoing outline of procedure under the Act, it appears that the proceedings authorized by the Sidewalk Act differ from the proceedings authorized by the Local Improvements Act mainly in this, to-wit, that under the Sidewalk Act no proceedings before the Board of Local Improvements and no proceedings in court to secure a judgment of

confirmation of a special tax, are either necessary or proper. But it should be remembered, as before observed, that under the Sidewalk Act, when application for judgment against land as delinquent is made, objections can be interposed by the property owner, which would be cut off in the proceedings under the Local Improvements Act by the judgment of confirmation. . . .

I can see no legal basis for an opinion that it would not be advisable to resort to the provisions of the Sidewalk Act in the building of small pieces of sidewalk in Chicago. There is no evidence, however, that in point of fact the city has ever attempted to construct sidewalks under the provisions of this Act, and you will observe that all the cases under it, which have reached the Supreme Court, arose in villages and in small cities. . . .

An interesting opinion on the subject matter of your letter by Corporation Counsel F. S. Winston, Jr., will be found on page 67 of "Opinions of the Corporation Counsel and Assistants."

Yours respectfully,
 HENRY SCHOFIELD,
Assistant Corporation Counsel.

Approved:
 CHARLES M. WALKER,
Corporation Counsel.

JUNE 6, 1900.

MR. WILLIAM D. KERFOOT, Comptroller,

Dear Sir:

I have the honor to acknowledge your request for my opinion upon the following question, to-wit: Has the Comptroller, by virtue of the order of the Council and of the judgment hereinafter specified, the right to pay to Messrs. Ryan & Maloney the sum of five hundred dollars (\$500), out of a balance of six hundred and thirty-one dollars and thirty-eight cents (\$631.38) of a fund collected by the city by special assessment proceedings to defray the cost of constructing a sewer in Park avenue.

According to my understanding the facts which give rise

to said question are substantially as follows: On August 25, 1897, Messrs. Ryan & Maloney made a contract with the city to construct a sewer in Park avenue, the construction of which had been authorized by an ordinance providing that the cost thereof should be paid by special assessment. On September 12, 1898, after all the work had been done, the city made to said Ryan & Maloney the last payment required by the terms of said contract for work done thereunder, and Ryan & Maloney accepted the same. Ryan & Maloney asked for additional compensation for extra work claimed to have been done by them in building said sewer. In regard to compensation for such extra work, their contract provided, in substance, that said Ryan & Maloney should make no claim whatever for extra work or for a greater amount of money than was stipulated in the contract to be paid, unless some changes in or additions to said work requiring additional outlay should first have been ordered, in writing, by the Commissioner of Public Works; and further that Ryan & Maloney should be entitled to no payment for extra work not specified in the contract, unless said work should have been done under the written order of the Commissioner of Public Works attached to said contract, specifying the nature and the amount of the extras and that said extras were necessary for the proper completion or security of the work previously done, and the reasons therefor.

It is not pretended that the extra work claimed to have been done by Ryan & Maloney was done under any order, written or otherwise, of the Commissioner of Public Works.

The record, as printed, of the Proceedings of the City Council for 1898-1899 (pp. 868, 918), shows that on October 29, 1898, the Committee on Finance, having had said claim of Ryan & Maloney under advisement, reported to the Council in favor of allowing said claim, and recommended the passage of an order which, as finally passed by the Council (p. 918), reads as follows:

“ORDERED: That the Corporation Counsel be and he is hereby authorized and directed to allow judgment to be entered against the city, in favor of Ryan & Maloney, in full settlement of their claim for extras on account of building

sewer in Park avenue, in the sum of five hundred (\$500) dollars, and this will be his authority for so doing. Said judgment to be paid from the special assessment levied for said work, when the same is collected."

Thereafter, and on November 29, 1898, Ryan & Maloney began a suit against the city in the Circuit Court of Cook County. The then Corporation Counsel, pursuant to the direction contained in said order, on the same day waived service of process, entered the appearance of the city, and consented to a judgment in favor of Ryan & Maloney against the city for the sum of five hundred dollars (\$500), and judgment was then and there entered for said amount. The judgment order is in the usual form, with the following additional clause: "To be paid out of the special assessment for a sewer in Park avenue when the said assessment is collected, the same being represented by Warrant No. 22,736."

On said facts, it is my opinion that your question must be answered in the negative; that the Comptroller, by virtue of said order of the Council and of said judgment, has no right to pay to Ryan & Maloney the sum of five hundred dollars (\$500) out of the fund specified, because said order of the Council and said judgment were and are, in so far as the attempt to provide for payment of said five hundred dollars (\$500) out of said specified fund, null and void, for the following reasons:

The consideration, as expressed in said order of the Council, upon which said judgment is based, consists of "extras on account of building sewer in Park avenue." Said word "extras" must have one of two meanings, namely: either, first, that Ryan & Maloney furnished labor and materials to make such minor changes in the work specified in their contract as were found necessary in the progress of the work of building the sewer and which were within the general scope of the original improvement and necessary to render it all effective; or, second, that Ryan & Maloney furnished labor and materials not provided for at all in the improvement ordinance, and wholly outside the general scope of such improvement.

First. On the assumption that the consideration upon

which the said judgment is based consists of "extras" in the first sense, the said order of the Council and the judgment based thereon are null and void, as an attempt to grant to a public contractor extra compensation after service rendered and after contract made.

Section 19, Article 4, of the Constitution of the State, provides as follows:

"(1.) The General Assembly shall never grant or authorize extra compensation . . . to any public . . . contractor, after service has been rendered or a contract made; (2,) Nor authorize the payment of any claim or part thereof hereafter created against the State under any agreements or contracts made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

It is not necessary to consider whether the said order of the Council is in conflict with the second prohibition in said section of the Constitution. Nor is it necessary to consider whether said order of the Council is authorized or prohibited by any statute of the State.

Applying said first prohibition to the facts in this case, very clearly Ryan & Maloney were public contractors, within the meaning of the word "public contractor" used in said prohibition. Clearly, also, said order of the Council attempts to grant to said Ryan & Maloney "compensation" both "after service has been rendered" and "after a contract made." Clearly, further, said compensation is "extra compensation", even if the words "extra compensation" be construed to mean merely compensation *in addition* to that specified in the contract. But the words "extra compensation" do not mean merely additional compensation; they mean compensation *outside* the contract, that is to say, ascertained in a mode and manner and by a rule not specified in the contract, but entirely outside of it. The mode and rule prescribed in the contract is the written order of the Commissioner of Public Works. To pay for work done without such order clearly is going outside the contract to ascertain the contractor's compensation. Presumably, also, the Commissioner gave no written order for the extra work for which compensation is

now claimed, because, in his judgment, the alleged extra work was included in the contract originally made; and, therefore, to pay for alleged extra work done without such order would be giving compensation in addition to that specified in the contract.

Second. Upon the assumption that the consideration upon which said judgment is based consists of "extras" in the "second" sense, it is not necessary to consider whether the said order of the Council is in conflict with said section of the Constitution, for it is very clear that it is not within the power of the city to apply money, raised by special assessment to defray the cost of a local improvement, to pay for work not provided for at all in the improvement ordinance and wholly outside the general scope of the improvement specified in such ordinance. When the cost of the improvement has been paid, any money remaining of the fund raised by special assessment must be returned to the property owners from whom it was collected, and cannot be the subject matter of an appropriation by the city for a purpose not within the general scope of the improvement.

Section 12, Article VI, of the City Charter, provides:

"All moneys received on any special assessment shall be held by the treasurer as a special fund, to be applied to payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever, unless to reimburse such corporation for money expended for such improvement."

Whether the said judgment is valid as a general judgment, to be paid as other judgments against the city are paid, is a question on which no opinion is expressed.

For the foregoing reasons it is my opinion that the Comptroller cannot pay the five hundred dollars (\$500) out of the fund specified in the question.

Very respectfully,

HENRY SCHOFIELD,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JUNE 8, 1900.

HON. JULIUS GOLDZIER, Alderman, Twenty-second Ward.

Dear Sir:

I beg leave to submit the following reply to your letter of the 23d inst. to this department, in the matter of the settlement between the Town of Cicero and the City of Chicago concerning the annexation of Austin.

You state that the committee representing the Town of Cicero, in making up the amount with which it claims the City of Chicago is chargeable, inventories the following pieces of real estate:

Holden Park, bounded by Lake street, Ohio street, Park avenue and Central avenue; valuation...	\$85,905
Merrick Park, bounded by Indiana street, Kinzie street, Willow avenue and Pine avenue; val- uation	63,291
Austin Park, comprising three parcels of land lying between Waller avenue on the east and Austin avenue on the west and between Lake street and the Chicago & North Western Railroad; valuation	45,000
	\$194,196

You ask what title the Town of Cicero has or ever had in the real estate in question and what title it can convey to the City of Chicago.

I have examined the records in the Recorder's office, and find therefrom that Holden Park and Merrick Park were duly acknowledged, platted and recorded in accordance with Chapter 109 of the Revised Statutes of Illinois. The plats were recorded May 12, 1866, and the pieces of property in question were marked thereon "Holden Park" and "Merrick Park" respectively.

I am therefore of the opinion that, in accordance with the provisions of Chapter 109 aforesaid, title to these pieces of property became vested in the Town of Cicero in trust for the public. Such is the effect of a statutory dedication.

Section 5, Chapter 109, Hurd's Revised Statutes (1899), p. 1281;

Village of Brooklyn v. Smith, 104 Ill. 429;

Union Coal Company v. City of La Salle, 136 Ill. 119.

As to the property known as Austin Park, I find that it consists of lots three hundred and seventy-nine (379), in block thirteen (13), and three hundred and eighty (380), in block fourteen (14), in Austin's Second Addition to Austin, and lot two (2), except the east sixty-six (66) feet, in block eleven (11), in Austin's original Subdivision of Austinville. The records show that this property was conveyed by Henry W. Austin and wife, December 3, 1885, to the Town of Cicero as a donation for a public park and pleasure ground, for the use and benefit of the people of said town. This conveyance was recorded December 31, 1885, as Document No. 680,785, incorrectly indexed as No. 680,788.

I am therefore of the opinion that the above mentioned conveyance of Austin Park vested title thereto in the Town of Cicero in trust for the people of the Town of Cicero. At the time of the annexation of Austin to the City of Chicago, therefore, the Town of Cicero held title to all three parks, in trust, as above set forth.

The question next arises as to what title the town of Cicero can convey to the City of Chicago. Section 8 of the Annexation Act provides that, upon annexation,

“ . . . the enlarged city, town or village shall be vested with the title and ownership of all the public and school property in such annexed territory and shall be charged therewith in the division of the public property of such dismembered city, incorporated town, or village . . . ”

Hurd's Revised Statutes (1899), p. 302.

It must therefore be determined how much if anything, the City of Chicago is to be charged for the property in question. I think it is clear that the city cannot be charged any more than the value of the Town of Cicero's interest therein. What this value is depends on the character of the Town of Cicero's interest.

“Municipal corporations possess the incidental or im-

plied right to alienate or dispose of the property, real or personal, of the corporation of a private nature, unless restrained by charter or statute; they cannot of course dispose of property of a public nature in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets or commons. The distinction is between property which a corporation may own the same as a natural person and that which it holds in general or special trust."

Dillon on Municipal Corporations (Fourth Edition), p. 671.

In *City of Alton v. Illinois Transportation Company*, 12 Ill. 38, it is said (60):

"Whatever title to these public grounds (i. e. a public highway, landing or common) may be vested in a city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they rightfully be used. For those purposes a city may improve and control them and adopt all needful rules and regulations for their management and use; but she cannot alien, or otherwise dispose of them for her own exclusive benefit nor are they subject to the payment of her debts. At most she but holds them in trust for the benefit of the public. The right to the use of the property is not limited to the citizens of Alton, but the citizens of the State generally have an equal right with them in the appropriate enjoyment of the dedication. This is not like the case of property purchased by the city for her own exclusive use, which she could dispose of at her pleasure."

City of Alton v. Illinois Transportation Company, 12 Ill. 38 (60).

In *City of Chicago v. Wright*, 69 Ill. 318, the court said (327):

"The right of use is not limited *exclusively* to the citizens of Chicago, but the citizens of the State generally have an *equal* right with them in the appropriate enjoyment of the dedication. This was so held in *City of Alton v. Illinois Transportation Company*, 12 Ill. 60, and is a proposition that none can gainsay."

City of Chicago v. Wright, 69 Ill. 318 (327).

“Public streets and alleys and commons are for the public use; that is, by the people of the State at large; and they are none the less for the use of the public at large, as distinguished from a municipality, because they are situated within the latter; and the Legislature may have given the supervision and control of them to such local municipal authorities. *City of Alton v. Illinois Transportation Company*, 12 Ill. 60.”

City of Chicago v. Gosselin, 4 Brad., 570 (573).

These parks were not the private property of the Town of Cicero. The town did not pay anything for them or purchase them for “its own exclusive use.” The city cannot dispose of them at its pleasure or sell them and use the proceeds of the sale for general municipal purposes.

I am therefore of the opinion that as the interest held by the Town of Cicero in these three pieces of property was merely that of a trustee, and as the entire beneficial interest therein belongs to the public at large, in the case of Holden and Merrick Parks and to the inhabitants of the Town of Cicero, in the case of Austin Park, the City of Chicago has now become, by the fact of annexation, the successor in trust and holds title to this property in the same way that the Town of Cicero did.

In my opinion the City of Chicago should not be charged anything for these parks. If the city is to be charged with their value, it would be equally proper to charge it with the value of the streets in the former Town of Austin.

Respectfully yours,

ROSWELL B. MASON,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JUNE 7, 1900.

MR. WILLIAM D. KERFOOT, Comptroller,

Dear Sir:

Your favor of the 1st inst., addressed to the Corporation

Counsel, with reference to the action of the County Clerk in permitting owners of property to redeem from sale for delinquent special assessments which the city had purchased at tax sale, without paying the penalty provided, has been handed me for reply.

Section 211 of Chapter 120 of the Revised Statutes, 1899 (Hurd's), provides:

"If any purchaser of real estate sold for taxes or special assessment shall suffer the same to be forfeited to the State, or again sold for taxes or special assessment, before the expiration of the last day of the second annual sale thereafter, such purchaser shall not be entitled to a deed for such real property until the expiration of a like term from the date of the second sale or forfeiture, during which time the land shall be subject to redemption, upon the terms and conditions prescribed in this act; but the person redeeming shall only be required to pay for the use of such first purchaser, the amount paid by him. The second purchaser, if any, shall be entitled to the redemption money, as provided for in the preceding section: *Provided, however*, it shall not be necessary for any municipal corporation which shall bid in its own delinquent special assessments, at any sale, in default of other bidders, to protect the property from subsequent forfeiture or sales, as above required in this section."

It is my opinion that the law intends to assist in collecting and enforcing the payment of all just taxes and assessments by its penalties and even forfeitures, and that a purchaser at a tax sale shall not suffer the same property to be forfeited to the State, or again sold for taxes or special assessment, before the expiration of the last day of the second annual sale thereafter, if he desires to obtain a deed. And as this statute further provides that if such purchaser does allow a sale to take place before the expiration of two years, the person redeeming shall only be required to pay for the use of such purchaser the money paid by him; and the second purchaser, if any, shall be entitled to the redemption money as provided by law, thus rendering protection to the citizen, but at the same time forcing him to pay his tax, or in case of his ultimate refusal, then forfeiture or sale of his

property follows. The proviso in the above quoted section of the statute provides: "It shall not be necessary for any municipal corporation which shall bid in its own delinquent special assessments, at any sale, in default of other bidders to protect the property from subsequent forfeitures or sales, as above required in this section." Thus in the clearest language relieving the municipal corporation which bids in its delinquent special assessments at any sale from the necessity of protecting the property from subsequent forfeitures or sales, as is required to be done by the ordinary purchaser, as above set forth, at such sale.

The claim of the city for the penalties under this statute is continuously refused by the County Clerk.

As the proviso contained in the above section of the statute has never been construed by a court and is of great importance to the city and owing to the continuous refusal of the County Clerk to pay these penalties to the city, I think the real estate agent of the city should select a clear case to be tested by a suit in court.

Yours respectfully,

ARMAND F. TEEFY,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JUNE 13, 1900.

HON. CARTER H. HARRISON, Mayor of Chicago.

Dear Sir:

A request has been made for an opinion from this department as to whether the Mayor can be compelled to issue a license to run a bowling alley in a neighborhood where, in the opinion of the Mayor the operation of a bowling alley would constitute a nuisance. It appears that the question is raised on account of one F. Jaeger having secured a permit from the Building Department to build a one story structure to be used as a bowling alley at No. 255 Webster avenue, said premises being located very close to a church.

In my opinion the courts would not issue a writ of mandamus to compel the Mayor to issue a license to any person for the keeping of a bowling alley in any neighborhood where the operation of such bowling alley would constitute a nuisance.

In the 44th Clause of Article 5 of the Cities and Villages Act, entitled "Powers of the City Council", the City Council is authorized "to license, regulate, tax or prohibit and suppress . . . pin alleys and ball alleys." The terms "pin alleys and ball alleys" undoubtedly mean bowling alleys. Under the authority of this clause the City Council has passed an ordinance which is included in Paragraphs 158 to 161 inclusive of the Revised Code of 1897, which provides that no person shall keep a pin alley or ball alley without first obtaining a license therefor, and requires the payment of ten dollars (\$10) per annum for each alley as a license fee, and also authorizes the Mayor to issue these licenses. No provision is made in this ordinance regarding the location of the bowling alleys, nor is any requirement as to the character of the applicant for a license made. I believe that the principle to be applied in regard to the power of the Mayor to refuse to issue a license for the keeping of a bowling alley would be exactly the same as that applied in the case of an applicant for a saloon license, and under the authority of the case of *People, ex rel, John Powers v. Mayor Swift*, 63 Ill. App., p. 454, the Mayor is justified in refusing to issue a license for the keeping of a saloon in a residence neighborhood where in his opinion the location and operation of such a saloon would constitute a nuisance. . . .

It is my opinion that the court would hold in the case of an applicant for a license to operate a bowling alley in a residence neighborhood, or so close to a church that any reasonable man would be of the opinion that such operation would constitute a great inconvenience and annoyance to the congregation of such church, that the Mayor would be justified in refusing to issue a license which would permit the holder thereof to carry on a nuisance or a business which would greatly annoy or inconvenience those in its immediate neighborhood, and would not by writ of mandamus inter-

fere with the exercise of the Mayor's discretion in such a case. . . .

Very truly yours,

WM. H. ARTHUR,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JUNE 18, 1900.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

In obedience to your resolution directing the Corporation Counsel to present a report setting forth and defining:

“a. What a public telephone is; and

“b. The right, if any, of the people to the use and enjoyment of public telephone service under the various ordinances by and through said Chicago Telephone Company does business, and of the character and efficiency such service should possess.”

I have the honor to submit the following:

In the true sense a public telephone is a telephone which it set up, maintained, and controlled by a telephone company for the use and convenience of the entire public, and which any member of the public, without the permission, interference or control of any other person, may use, on complying with regulations prescribed by such company in regard to the charge for and manner of using such telephone. A slot machine telephone is a good example of a public telephone.

The ordinances under which the Chicago Telephone Company is operating in the territory now embraced within the city limits do not require said company to set up, maintain and control public telephones of the kind embraced in the above definition.

Apart from any statute or ordinance, however, and by virtue of the common law alone, said Telephone Company, be-

ing engaged in a public employment and its business being affected with a public interest, is bound to serve impartially and without discrimination all who apply for service and who tender a compliance with its regulations. Consequently, while under existing ordinances said company is not required to set up, maintain, and control public telephones of the kind above defined, yet it may do so, and if, in point of fact, it does do so, all who apply to use such public telephones must be treated alike, both as to the character and efficiency of the service and as to the rate charged.

Under Section 6 of an ordinance passed by the City Council January 4, 1889 (Special Ordinances, 1898, Vol. II., p. 1, 870), the Chicago Telephone Company is required to grant, in consideration of an extra fee of twenty-five dollars (\$25), to a subscriber for a telephone, the right to permit the public to use his telephone, and to charge a fee of ten cents (\$0.10) for each time any member of the public uses such telephone, because said Section 5 required said company to file with its acceptance of said ordinance a "schedule showing the rates charged by said company, for telephone service at the date of the passage of this ordinance within the limits of the City of Chicago," and pursuant to said requirement said company filed a schedule in which it stated it would, within certain limits, for an extra fee of twenty-five dollars (\$25), install a telephone "to be used as a public telephone, with the right to permit the use to the general public and charge therefor ten cents (\$0.10) for a local connection."

Where the Chicago Telephone Company either itself maintains and controls a public telephone or for an extra fee grants to a subscriber for a private telephone the right to permit the public to use such telephone, the character and efficiency of the service furnished by said company must be such as the state of the art of communicating messages by telephone reasonably permits.

Respectfully submitted,

CHARLES M. WALKER,
Corporation Counsel.

JUNE 27, 1900.

JOHN A. MAY, Esq., Superintendent of Special Assessments.

Dear Sir:

Your letter of the 14th inst., addressed to the Corporation Counsel, requesting an opinion whether lands owned by the United States Government are subject to a special assessment for street improvement, has been handed to me for reply.

Broad and comprehensive as the power of taxation existing in the State is, it is not so extensive as to embrace property regarded as the instruments or means of conducting the Federal Government in pursuance of the Constitution. Such property has always been conceded to be exempt from taxation by State Governments. Custom houses, postoffices and court houses are necessary instrumentalities, and are proper means to be employed by the General Government in executing its sovereign powers. This property, then, could not be taxed or assessed by the State. Fully realizing the difference between "taxes" and "special assessments" it does not follow that public property may be assessed. A municipal corporation has no power to assess or exact from the State or the General Government any sum for benefits conferred. The power to levy taxes or enforce assessments for benefits can only be exercised on the governed, and not on the governing power, whether State or Federal.

Fagan, et al. v. City of Chicago, 84 Ill. 227.

In re, City of Mt. Vernon, 147 Ill. 359.

Therefore, from the many decisions of our Supreme Court, and other courts, to the effect above set forth, it follows that the City of Chicago has no power to levy a special assessment for a street improvement upon property owned by the United States. I am informed that upon application to the proper authorities in charge of the respective properties of the United States, they will have such improvements made.

Yours respectfully,

ARMAND F. TEEFY,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

AUGUST 13, 1900.

TO THE HONORABLE, THE MEMBERS OF THE SPECIAL PARK
COMMISSION.

Gentlemen :

The letter of your Secretary, of the 18th inst., addressed to the Corporation Counsel, requesting an opinion as to the power of the city authorities to commence proceedings for the condemnation of land and buildings for the purpose of establishing parks and playgrounds, has been referred to me for a reply.

The necessity or expediency of exercising the right of eminent domain in the appropriation of private property to public use rests with the Legislature or the corporate body or tribunal upon which it has conferred the power to determine the question and its opinion is conclusive upon the courts.

Chicago v. Wright, 69 Ill. 327.

But the question *whether the specified use is a public use or purpose* or such a use or purpose as will justify or sustain the compulsory taking of private property is ultimately a judicial one, and the courts cannot be absolutely concluded by the action or opinion of the legislative department. If the Legislature has declared the use or purpose to be a public one, such a declaration will be respected, unless the use be palpably private or the necessity for the taking be without reasonable foundation; but if the use be public, or so doubtful that the courts cannot pronounce it to be such as to justify the compulsory taking of private property, the decision of the Legislature that a necessity exists to take the property is final and conclusive.

Since public necessity is the basis of the right of eminent domain the right cannot be exercised except where the *purpose is useful*, and property cannot be compulsorily acquired against the owner's consent when wanted merely for *ornamental* purposes.

Woodstock v. Gallup, 28 Vt. 587.

West River Bridge Company v. Dix, 6 How., 545.

Cooley's Constitutional Limitations (Sixth Ed.), 654.

"If it be admitted or shown in any given case that the

ornamental purpose is not associated with any useful purpose, it would seem to be true that it is inconsistent with the respect in which all enlightened governments hold private property to say that it can be compulsorily taken from the owner. Such a use is not, within the meaning of the American Constitution, a legitimate *public use*. . . . It would be an extreme case where a purpose was wholly ornamental and not at all useful."

Dillon on Municipal Corporations (Fourth Ed.), Vol. II., Sec. 599, et seq.

On the ground that the public health, convenience, and welfare will thereby be promoted, the Legislature may authorize the condemnation of private property for the purpose of using the same for a public park.

In re Central Park Extension, 16 Abb. Pr. (N. Y.). 56.

South Park Commissioners v. Williams, 51 Ill. 63.

Mills' Eminent Domain, Sec. 49, 50.

Lewis' Eminent Domain, Sec. 175.

Shoemaker v. United States, 147 U. S. 282.

Holt v. Somerville, 127 Mass. 408.

The Legislature has bestowed upon the City of Chicago the power:

"To lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same."

Hurd's Revised Statutes (1899), Sec. 7, Par. 62, Art. 5, Chap. 24.

This power conferred upon the City Council necessarily implies and includes the power to institute a condemnation proceeding to carry such power into effect.

I. C. R. R. Company v. City of Chicago, 138 Ill. 458.

C. & N. W. R. R. Company v. Town of Cicero, 154 Ill. 656.

From which it appears that the city has the power to lay out, establish, and open streets, and, by analogy, to lay out and establish parks and public grounds, since as early as 1836 it was held that the taking of ground for a public square was as much a public use as if taken for a street.

Owners, etc., in re, Pine Street v. Albany, 15 Wend. (N. Y.), 374.

Therefore, from the many decisions upon this subject, it is my opinion that the city possesses full power to condemn land for a public park, which has often been held by the courts to be a public and a useful purpose, and consequently a foundation for the exercise of the right of eminent domain on the part of the city.

Respectfully yours,

ARMAND F. TEEFY,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

SEPTEMBER 13, 1900.

JOHN A. MAY, Esq., Secretary

Board of Local Improvements.

Dear Sir:

In reply to your letter of September 11, 1900, asking for an opinion as to whether the bid of Mr. Hardin for a contract for laying water mains was rendered invalid by reason of the fact that such bid was handed in about ten or fifteen minutes after 10 o'clock, when the published notice calling for bids stated that bids would be received "until 10 o'clock A. M.," and would be opened at 10:30 o'clock A. M., you are advised that such bid was not rendered invalid by reason of the aforesaid circumstance. The statute under which the notice was published (Section 76 of the Local Improvement Act of 1897) requires that the notice shall state "the time of opening such bids." There is no provision in the statute requiring that the notice shall state the latest moment of time at which bids will be received. Even if it be true that the Board of Local Improvements may insert such a statement in the notice, the Board is not absolutely bound thereby, but may waive it. Indeed it may well be argued that the intention of the statute is that the Board should receive all

bids handed in at any time prior to the time fixed in the published notice for opening the bids.

Very respectfully yours,

HENRY SCHOFIELD,
Assistant Corporation Counsel.

Approved:

ARMAND F. TEEFY,
Acting Corporation Counsel.

SEPTEMBER 15, 1900.

MR. F. W. SOLON, Assistant Superintendant of Streets.

Dear Sir:

Your letter of the 15th ult. to the Corporation Counsel is at hand. You state that you intend to serve notice upon the Calumet Electric Street Railway Company, the General Electric Railway Company and the South Chicago City Railway Company that unless certain specified places, which are in a very dangerous condition, on their rights of way are repaired within ten days from the date of this notice, the city will barricade the same. You ask if you have a right to serve such a notice.

On the 16th ult. I wrote you and asked for a list of the places or streets upon which repairs were needed and in regard to which you contemplated serving notice upon the street railway companies, in order that I might examine the franchises of the street railway companies relating thereto. On the 17th ult. you wrote this department that you could not see wherein a list of such places or streets were necessary and that you desired an opinion to cover such cases as might arise from time to time.

The rights and duties of the street railway companies in connection with the streets of the city depend upon the terms and conditions of the various ordinances granting them permission to operate thereon. Each one of these ordinances upon its acceptance by the street railway company became a contract between the company and the city. These ordinances differ very materially from each other in their provisions for street repairs. Some of the ordinances require street railway companies to repair their rights of way in accordance with

the directions of the Commissioner of Public Works, while others require them to do this work in accordance with the directions of the City Council.

The city cannot shift its primary duty to the public to keep its streets in good condition and repair upon the street railway company. The law is well stated in Booth on Street Railways, on page 352, where it is said:

“The duty incumbent on a public corporation, to maintain its streets in a safe condition, cannot be evaded by granting a license therein to another. However stringent the conditions it may impose, however explicit the obligations it may exact for the benefit of the general public, it cannot by ordinance or contract relieve itself from liability for the culpable negligence of one who, in the exercise of a street franchise, creates an obstruction which results in damages to others who are lawfully using the highway. The right to control carries with it the duty to guard, care for and preserve. By granting a railway license it does not surrender its right to control its streets or transfer its obligation to maintain them. The grantee of the franchise has only a qualified right in the streets, subject always to the right of the public authorities to compel it to repair or, on its default, to make necessary repairs and recover the expense. Therefore, the municipality is directly liable for injuries caused by defects in its streets, if after actual or constructive notice, it fails to exercise reasonable care and diligence to remedy them.”

— See also Dillon on Municipal Corporations, 4th Ed., Vol. 2, Section 1037, and authorities there cited.

In those cases where the companies are bound to make repairs in accordance with the directions of the Council, action should be taken by that body; in those cases where the companies are bound to make repairs in accordance with the directions of the Commissioner of Public Works the notices should be signed by him personally. The requirements of such notices should not exceed the duties imposed upon the companies by the ordinances under which they operate. If the directions of the Commissioner of Public Works are disregarded, legal proceedings may be brought to compel the

street railway companies to make the repairs, or they may be made by the city and suit brought against the companies to recover the cost thereof.

If any street or portion thereof in the city upon which street car tracks are laid is in a dangerous condition, the Commissioner of Public Works has the right to barricade such street or portion thereof until it can be made safe by the city, if the street car company is bound by the ordinance under which it operates to make the necessary repairs in accordance with his directions, and refuses or fails to do so.

Yours respectfully,

ROSWELL B. MASON,
Assistant Corporation Counsel.

Approved:

ARMAND F. TEEFY,
Acting Corporation Counsel.

SEPTEMBER 28, 1900.

MR. WILLIAM LOEFFLER, City Clerk.

Dear Sir:

In reply to your communication of the 14th inst., in which you ask for an opinion whether the office of the Deputy City Clerk is included in the classified service as contemplated by the Civil Service Act of 1895, I have the honor to say:

The question raised has been directly considered by the Supreme Court of this State in the case of *People v. Loeffler*, 175 Ill. 585. In this case an original petition for mandamus was filed in the Supreme Court against the City Clerk of Chicago, alleging that he had neglected to notify the Civil Service Commissioners of vacancies in the positions of certain clerks and other employes in his office and to make requisitions on the Commissioners for the names of persons to fill such vacancies. The City Clerk in his answer contended that none of the places of employment in his office was within the scope and meaning of the Civil Service Act, and that he had the sole power and authority to fill such vacancies with-

out regard to the Act. The petitioner prayed that a writ of mandamus might issue to the City Clerk directing him to notify the Civil Service Commission of all vacancies existing, or which might exist, in the positions of deputy city clerk, clerks or other employes or subordinates in his office, and to make requisitions to fill such positions in accordance with the terms of the Act. There was here, it will be seen, a direct issue raised. The City Clerk claimed that no employe of his department came within the Act, while the petitioner asserted that no position under the City Clerk himself, was exempt. It is true that the office of Deputy City Clerk is not specifically considered in the opinion of the court, but the language of the opinion makes no distinction between any of the subordinates in the office. The decision turned on whether Section 22 of Article VII of the Cities and Villages Act, providing that the City Clerk should appoint such various clerks and subordinates in his office as the City Council might authorize, was repealed by the enactment of the Civil Service Act. In holding that the earlier Act was repealed by the latter, the Supreme Court makes no exception in favor of any position. Referring to the heads of the principal departments of the city government, the court says: "The subordinate positions and places of employment under these officials come under the designation of 'offices and places of employment in such city.' All the offices and places of employment in such cities, and not a part of them, except those mentioned in Section 11, are to be classified under the Civil Service Act." The court ordered the writ issued in accordance with the prayer of the petitioner, that is to say, so as to include within its mandate the office of Deputy City Clerk.

In your letter you call attention to Section 13 of the Revised Code of Chicago, Paragraph 6, of which provides that the City Clerk "may appoint a deputy, who, in the absence of the clerk in case of sickness or otherwise, shall be empowered to perform all the duties of the City Clerk." The argument, of course, is, that the office is not within the scope of the Act for the reason that it was in existence under the ordinances of the City of Chicago at the time of the passage of the Act in 1895, and that the incumbent may therefore

be considered the head of the department under the terms of Section 11 of the Civil Service Act. It is true that in the case of *People v. Kipley*, 171 Ill. 44, the court held that the phrase in Section 11, "heads of any principal department," must be considered with reference to the existing ordinances of the city in force at the time of the passage of the Act. When the Act was passed there was by ordinance only one head each for the Department of Police, the Fire Department, the Health Department, the Department of Buildings. Therefore the court held that the Legislature acting with full knowledge of these ordinances "must have intended to refer to each single head of each principal department by the words used in Section 11." But the argument in the *Kipley* case goes much beyond this. Irrespective of the ordinances existing at the time of the passage of the Act, the court holds that there may only be one head of any principal department, on the ground that the intention of the Legislature to make both original appointments and subsequent promotion depend upon merit as ascertained by examination, would be defeated if a number of subordinates in any department were to be considered heads of the department under Section 11 and so block the opportunity of those below them for promotion in the service.

It has been urged that the Deputy City Clerk is in a peculiar sense a head of the department, in that by Section 6 above quoted, he is "empowered to perform all the duties of the City Clerk in the latter's absence." This contention, however, was directly passed on in the *Kipley* case. Referring to the argument made by counsel for the defendant in that case the court says: "It is said that, where an employe is authorized to exercise control in the absence of the chief officer of the department, such employe ought to be considered a head. There is nothing in the Act which justifies the application of any such rule, in order to determine who are the heads." This statement of the court is decisive of the question which you ask, without taking into account the direct bearing of the decision in the case of *People v. Loeffler*.

I am therefore of the opinion that the office of Deputy

City Clerk comes within the provisions of the Civil Service Act.

Yours very truly,
COLIN C. H. FYFFE,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

OCTOBER 1, 1900.

CHARLES WERNO, ESQ., **Chairman**

Sub-Committee of Judiciary Committee.

Dear Sir:

You ask of this department whether the city has a right to refuse to issue any permits to the Municipal Gas Company for the opening of streets and the extension of supply pipes, and whether the city can compel that company to furnish throughout the city gas to consumers at the same rate now charged by it in the territory in which it operates.

These questions expressly assume that the Municipal Gas Company is a mere creature of the People's Gas Light and Coke Company and is put forward as a sort of dummy to accomplish the discrimination in rates which would not be possible openly to the People's Company.

As to the first question, it must be remembered that the Municipal Gas Company has no franchise from the City of Chicago or from the State which would authorize it to use the streets for the purpose of supplying gas. Whatever rights it has to the use of the streets must come to it in some contract capacity from the People's Gas Light and Coke Company. This might be attempted to be done in many ways. An amendment to the charter of the People's Company permits it to lease its property or franchises. The Gas Consolidated Act of 1897 by its terms empowers all gas companies "to sell, transfer and convey or lease their real and personal property, rights, privileges and franchises in whole or in part, to any other gas company doing business in the same city," "and such other gas company is authorized to purchase or lease and to hold and enjoy said property."

So far as the original charter of the People's Company is concerned with reference to the rights transmitted through it to the lessee I am of the opinion that such lessee, unless specifically authorized so to do, cannot hold the franchises of the People's Company and exercise and enjoy them to the same extent as the lessor; that is to say, the People's Company might have the power to lease, while the Municipal Company might not have the power to take the lease and thereby put itself in every respect in the same position as the lessor company.

As to the rights conferred on a lessee gas company by the Gas Consolidation Act of 1897, a much more serious question remains, namely, the constitutionality of that Act. Much has been said by eminent authorities both for and against the proposition that the Act is valid. It is enough for present purposes to say to your committee that the rights attempted to be conferred by that Act upon gas companies alone are doubtful in respect to validity from a constitutional standpoint; that if the claims of the Municipal Gas Company rested only on the provisions of the Gas Consolidated Act, the city authorities would be justified, so far as that company is concerned, in taking any position that made most strongly for the city's interests, and in leaving the ultimate decision of the rights of the company to the courts.

As to the second question, it must be borne in mind that the Municipal Company supplies gas in only a small section of the city; this it does at a uniform rate of forty cents per thousand cubic feet. If it is a mere dummy or creature of the People's Company, as your question assumes, then the attempt to bring about a uniform rate throughout the city must be made against the creator and not against the creature. The wrong is done by the People's Company on your assumption: It supplies the dummy and the dummy supplies cheap gas for the purposes of the People's Company, while, throughout the rest of the city, the People's Company still supplies the vast majority of consumers with gas at one dollar. It is manifestly the People's Company which must be compelled to reduce its rates if it is attempting an unjust discrimination between consumers. If this assumed connec-

tion between the two companies can be proved, the Municipal Company may be disregarded and the rights of the people to prevent unjust discrimination asserted against the People's Gas Light and Coke Company.

Yours very truly,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

OCTOBER 1, 1900.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

In compliance with the resolution passed by your Honorable Body, at its last meeting, September 24, 1900, directing the Corporation Counsel to submit an opinion as to the power of the City Council to compel the various elevated railroad companies having turnstiles installed at their stations, to remove them, I beg leave to say:

There is no provisions in any of the ordinances granting the various elevated railroad companies the right to operate in this city, which prohibits the use of turnstiles, nor is there any such prohibition contained in any general ordinance of the city. The question then, is, whether the City Council has the power to enact such legislation as will prohibit the use by the elevated railroad companies of turnstiles in the manner stated. Whether the City Council has such power depends largely upon a question of fact. If it can be established as a fact that the turnstiles complained of *are* a menace to the public and *do* jeopardize the life and limb of those who pass through them, as is recited in the preamble of the resolution under consideration, there can be no doubt of the power of the City Council to pass such legislation as will prohibit the use of such devices. If, on the contrary, however, it cannot be established as a fact that the turnstiles are liable to injure or seriously inconvenience the public passing through them, I think the City Council has not the power arbitrarily to order the discontinuance of the use of them, and in

my opinion an ordinance passed for such a purpose could not be enforced.

Very truly yours,
 CHARLES M. WALKER,
Corporation Counsel.

OCTOBER 10, 1900.

MR. JOHN J. SLOAN, Superintendent, House of Correction.

Dear Sir:

In reply to your letter of the 4th inst., to this department requesting advice as to your duty under "Section 2929 of the Revised Code," I beg leave to advise you:

The section which evidently you presume to be a city ordinance is a statute of the State and appears as Section 16, Chapter 67, Hurd's Revised Statutes (1899). So much of it as is germane to the question is as follows:

"It shall be his (the Superintendent's) duty to keep a record of each and all infractions of the rules and discipline of said House of Correction, with the name of each convict offending, and the date and character of each offense, and every convict sentenced or committed for six months or more, whose name does not appear on such record, shall be entitled to a deduction of three days per month from his or her sentence, for each month he or she shall continue to obey the rules of said House of Correction."

Section 168b, of the Criminal Code, provides (Hurd's Revised Statutes, 1899):

"Any person convicted of petit larceny or any misdemeanor punishable under the laws of this State in whole or in part by fine, may be required by an order of the Courts of Record in which the conviction is had, to work out such fines and costs in the workhouse of the city, town, or county, or in the streets and alleys of any city or town, or on the public roads in the county, under the proper person in charge of such workhouse, streets, alleys, or public roads, at the rate of one and fifty one hundredths dollars (\$1.50) per day for each day's work."

I am of the opinion that a prisoner in the House of Correction is entitled to the benefit of the three days in each

month for good conduct none the less because he is a prisoner for the purpose of working out a fine under the provisions of Section 168b of the Criminal Code, instead of being a prisoner under sentence for a specified time as a punishment for a crime committed. It is true that in Section 16 of Chapter 67 there are used only the words "sentenced or committed", and for this reason it might possibly be suggested that a person who is in prison under Section 168b of the Criminal Code is there only, to use the words of the statute, "by the order of the Courts of Record in which the conviction is had," and is there not under "sentence" or "commitment." But I am of the opinion that this is a strained construction and ought not to prevail. It is the policy of the law to resolve every doubt in favor of the person deprived of his liberty.

I do not believe that the application of the provisions of Section 16 of Chapter 67 to persons in your custody under Section 168b of the Criminal Code, would be at all in conflict with the directions contained in the copy of the mittimus accompanying your letter.

Yours truly,
W. H. FITZGERALD,
Assistant Corporation Counsel.

Approved:
CHARLES M. WALKER,
Corporation Counsel.

OCTOBER 16, 1900.

MR. F. X. BRANDECKER JR., City Collector.

Dear Sir:

You have referred to this department a communication dated October 8, from Adelbert Hamilton, in which he states that clients of his propose to manufacture a cordial containing nine and three-quarters per cent alcohol, and states that this product will be sold as a cordial or liqueur. An opinion is desired as to whether this product is an intoxicating liquor and comes within the scope of our liquor license laws.

In reply I beg leave to advise you that this product is undoubtedly an intoxicating liquor. The courts have decided that a liquor or liquid containing six and one-quarter per cent

alcohol is intoxicating; in fact, ale has no greater percentage of alcohol than six and one-quarter per cent. The amount of license fee to be paid will depend largely upon the manner in which the business is carried on, whether as a wholesale or retail dealer.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

OCTOBER 24, 1900.

MR. JAMES A. QUINN, City Sealer.

Dear Sir:

In your letter of the 24th inst., asking me for an opinion whether or not certain students, now living in the Twenty-fourth Ward at 80 Institute Place, have the residence required by law to entitle them to vote, I have to say:

A permanent abode is necessary to constitute a residence within the meaning of the election law, Section 66, Chapter 46, Revised Code, 1899.

The permanent abode perscribed as the criterion of the residence required to constitute a legal voter, does not mean an abode which the party does not intend to abandon at any future time. It means nothing more than a domicile, and home, which the party is at liberty to leave as interest or whim may dictate, but without any present intention to change it.

As our Supreme Court has decided in the case of *Dale v. Irwin*, 78 Ill. 170:

“The undergraduates of a college, who are free from parental control, and regard the place where the college is situated as their home, having no other to which to return in case of sickness or domestic affliction, are as much entitled to vote as any other resident of the town pursuing his usual avocation.”

It is my opinion that students who are here, if they are still under parental control and who would in case of sick-

ness or domestic affliction go home, would not possess the necessary residence here to entitle them to vote. The circumstances connected with each student would have to decide his case.

Very truly yours,

CHARLES M. WALKER,
Corporation Counsel.

NOVEMBER 3, 1900.

HON. L. E. MCGANN, Commissioner of Public Works.

Dear Sir:

Your letter of the 26th ult., enclosing correspondence from Mr. J. A. Spoor, President of the Union Stock Yard and Transit Company of Chicago, in the matter of the repairs and painting of the viaduct at Halsted and Thirty-ninth streets, is at hand.

You ask if the company is under obligation to repair and paint this viaduct. Mr. Spoor's reasons for refusing to make the required repairs, as appear from his letters, are: That there is no ordinance specifically requiring the company to do so and that by the terms of its contract with the city, under which the viaduct was constructed, it is specifically exempted from any further liability in regard to the viaduct other than the payment of the moneys necessary for its construction and for raising to the new grade certain of the adjoining buildings. This contract was filed in the Department of Public Works as Document No. 4725 on February 18th, 1896. The provision on which Mr. Spoor relies is as follows:

"Nothing herein contained shall impose upon the Union Stock Yard and Transit Company of Chicago any other or further liability in regard to said viaduct and its approaches other than the payment as aforesaid of the moneys required to meet said contracts and to raise the buildings to the extent as aforesaid."

In my opinion this provision cannot be construed to mean that the company is not obliged to make necessary repairs upon the viaduct. . . .

Full police powers have been delegated by the Legislature to the City Council, and it is undoubtedly within the power of

the City Council to pass an ordinance directing the railway company to make the necessary repairs upon this viaduct.

There is, moreover, a common law duty and a duty under the statute resting upon the railway company to repair this viaduct.

This department has frequently rendered opinions to this effect and Judge Chytraus, of the Superior Court, in an opinion printed in the National Corporation Reporter for July 12th, 1900, reviews the subject at length in the case of City of Chicago vs. Chicago & Northwestern Railway Company, and decides that the City can recover by a lawsuit money paid out by it for the repair of a viaduct over the tracks of the railway company, although no special ordinance or contract imposes any duty in this respect upon the railway company.

Yours respectfully,

ROSWELL B. MASON,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

NOVEMBER 23, 1900.

MR. H. O. NOURSE, Superintendent of Water.

Dear Sir:

Mr. Walker has referred to me your letter of the 9th inst., in which you ask for a "written opinion defining the right of any officer of the Department of Public Works to enter premises for the purpose of making an examination of water pipes or other appliances connected with the water system of the City of Chicago." You state that the cases in point which prompt your request for an opinion relate to the investigation being made by your department in the Stock Yards district.

The question asked in the first clause in your letter is much broader than any we have as yet had occasion to consider in connection with the Stock Yards investigation, inasmuch as you ask whether you have the right to enter prem-

ises for the purpose of making an examination of the water pipes *or other appliances* connected with the water system of the city. I can find no case decided by the courts in which a similar question has arisen, but it is my opinion that the City of Chicago should assert the right to enter any premises into which water pipes lead from a connection with the water mains of the City of Chicago, where such entry is deemed necessary for the purpose of an examination with a view to preventing fraud on the city, illegal use or waste of water. Each case of this kind which arises will, of course, have to be treated according to the facts as they exist in that particular case; but as a general rule I am of the opinion that the City of Chicago has the right to follow its water pipes and connections made therewith, for the purpose of protecting itself against loss.

You state in your letter, referring to verbal opinions given by myself to you in this matter, that "his verbal opinions have been to the effect that unless we had the consent of the owners of premises to enter their premises, we would be putting ourselves in the position of trespassers and could, under the law, be ejected." Permit me to say that you misinterpret me, for I have always held a contrary view and have repeatedly advised you that the City of Chicago had the right to follow its mains and pipes anywhere through the Stock Yards district, notwithstanding the fact that such pipes might be laid in private property, holding that where such pipes were laid in private property the city could rightfully claim that an easement had been given it, either express or implied, and that such easement carried with it the right to keep a pipe so laid in repair and to make such examinations thereof as were reasonably necessary for the purposes of the department. I did advise you, however, and am still of the same opinion, that you had not the right to enter private property and explore it in the expectation that your search would result in the finding of unauthorized connections with the city mains or prove suspicions you might have, regarding the illegal use of water, to be well founded.

You will recollect that Mr. Veeder, the attorney representing Messrs. Swift & Company, agreed with me in my position

in this matter and admitted the right of the City of Chicago to follow its pipes and mains, wherever they might run.

Very truly yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

DECEMBER 10, 1900.

MR. WILLIAM MAJOR, Chairman Finance Committee.

Dear Sir:

In reply to your communication in which you ask whether the office of Secretary of the Finance Committee is in the classified service of the city so as to require its holder to be certified by the Civil Service Commission, I beg leave to say that after considering all the elements which enter into the office, character of the services rendered, the mode of payment of compensation and the apparently permanent nature of the employment, I am of the opinion that the office is within the scope of the Civil Service Act. The holder of the position receives a fixed yearly salary which is provided for in the Annual Appropriation Bill. His duties are regular and the position is theoretically as permanent as the Finance Committee itself. As to the mode of appointment, the fact that the Secretary has hitherto been appointed by the Finance Committee does not bring him within the exceptions of Section 11 of the Civil Service Act. The exception to which you refer "that makes any city employe elected by the City Council exempt from the Civil Service law" relates only to such employes as "are elected by the City Council pursuant to the City Charter."

Respectfully yours,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

DECEMBER 10, 1900.

MR. F. X. BRANDECKER, JR., City Collector.

Dear Sir:

I have yours of the 7th inst., in which you call the attention of this department to the manner in which auction sales are conducted in various places throughout the city under auctioneer's licenses, and in which you ask "whether a licensed auctioneer can conduct two or three different auction stores in different parts of the city on a fifty-cent per day permit instead of having a license properly transferred or a new license issued for such continuous sales."

Section 130 of Chapter VII of the Revised Code, reads as follows:

"No auctioneer shall sell or offer for sale at public auction any goods, wares, merchandise or any other personal property in any place, house, store or other building other than in the place, house, store or building where he is authorized to sell by his said license, without a special permit from the Mayor."

In my opinion it is clearly the intention of this ordinance to prohibit auctioneers from conducting auctions in places other than that specifically mentioned in their license and the provision made allowing a licensed auctioneer to conduct an auction sale in any place other than that mentioned in his license by special permit from the Mayor should not be so construed as to permit an auctioneer to conduct two or three continuous auction sales in different portions of the city in the manner spoken of in your letter. The provision in Section 130 of Chapter VII, above quoted, permitting a licensed auctioneer to conduct a sale in a place other than that mentioned in his license by special permit from the Mayor, is one intended to permit a licensed auctioneer under special circumstances to conduct a sale for a limited period of time—say for instance, the effects of some household were to be sold at auction and most of these effects were removed to the auction rooms of a licensed auctioneer, and it was found impracticable to remove all of them from the house, a special permit in such a case might be issued by the Mayor, permitting the auctioneer to sell the portion not removed to

the auctioneer's rooms, at the house. It is not intended by this ordinance that one auctioneer be permitted to conduct sales at three or four different places and that another be confined to the place named in the license.

Yours very truly,

WM. H. ARTHUR,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

DECEMBER 26, 1900.

MR. WILLIAM D. KERFOOT, Comptroller.

Dear Sir:

In reply to your letter of the 15th inst., to this department for an opinion as to the steps required to be taken for the purchase of real estate by the City of Chicago, or any department thereof, I have to say:

The statute provides that the City Council shall, within the first quarter of each fiscal year, pass an appropriation bill in which the corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of the corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated to each object; and no other appropriations shall be made at any other time within such fiscal year, except it first be authorized by a majority of the legal voters of the corporation. (Par. 89, Article VII, Ch. 24, Revised Statutes, Hurd's Ed., 1899.) The City Council is forbidden to add anything to the corporate expenditures of such year over and above the amount provided in the annual appropriation of that year, except when a necessity for an improvement has arisen by reason of a casualty or accident happening after the annual appropriation is made. (Par. 90, Article VII, Ch. 24, Revised Statutes, Hurd's Ed., 1899.) Then the law provides:

"No contract shall hereafter be made by the City Coun-

cil or Board of Trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the City Council or Board of Trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided''.¹

Then the City Council by ordinance may direct the purchase of real estate necessary for certain corporate purposes within the appropriations made therefor in the annual appropriation bill.

Very respectfully yours,

ARMAND F. TEEFY,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER.
Corporation Counsel.

JANUARY 17, 1901.

HON. JULIUS GOLDZIER,

Chairman Track Elevation Committee.

Dear Sir:

The resolution adopted by your committee on the 8th of January requesting an opinion upon the question as to whether the city, having once ordered the erection of a viaduct can, if conditions so change as to render it necessary in the opinion of the city authorities, order the removal of the viaduct and the erection of sub-ways; and especially as to the power of the city to order removal of the Ogden avenue viaduct, has been referred to me.

As to the general power of the city to order the removal of a viaduct which has been erected under its prior direction and order, in case the conditions relating to the crossings have so materially changed as to make it necessary for the public welfare or safety to require the removal of the viaduct, there can be no doubt. The mere fact that the viaduct had been originally built under the directions of the city cannot

¹Note: See opinion on page, 326.

prevent the city from subsequently ordering its removal where the removal of the said viaduct has become necessary, in fact for the public welfare and safety. Inasmuch as conditions are constantly changing and as the police power of the city must always be applicable to the existing conditions, the fact that such power has been exercised at one time to compel the erection of a viaduct, is not in itself a bar to the exercise of the same power at some subsequent period or time and under different conditions in compelling the removal of such viaduct.

The question, however, as to whether the conditions existing are such as to render the removal of such viaduct necessary for the public welfare and safety is one which can only be decided by the courts. A mere change of opinion with respect to the maintenance of such a structure on the part of the city authorities will not permit the exercise of police power of the city in manner suggested. And it is evident that in order to persuade the court that the conditions have become such as to require the removal of a viaduct which had been erected under the direction and order of the city, the evidence to show that the removal of such structure is necessary for the public welfare and safety must be very strong.

But if, for instance, the removal of certain viaducts should be necessary in the elevation of railroad tracks in order to remove other grade crossings, then in view of the public interests which are necessarily involved in the elevation of such tracks, I am of the opinion that there can be no doubt but that the court would find that the conditions were such as to make the removal of the viaducts necessary and that the City of Chicago would have full power and authority to require the removal of such viaducts, notwithstanding they had been erected under its order and direction.

The only serious question which would arise in such a case in my opinion would be the question as to who should pay the cost of removing such viaducts and of building subways in the place thereof.

As to the Ogden avenue viaduct with respect to which

you desire a specific opinion, the question seems to me to depend entirely upon the purpose and object in view on the part of the city seeking to compel the removal of this structure. This viaduct was built in 1892 at a total cost of over \$200,000, of which, according to the report of the City Engineer for the year 1896 (to be found in the 21st Annual Report of the Department of Public Works, p. 125), the City of Chicago paid about \$113,000. By ordinance of July 20, 1891, relating to the Taylor street viaduct it was provided that the Chicago & Northern Pacific Railroad Company should pay \$40,000 towards the cost of the Ogden avenue viaduct (See Vol 2, Special Ordinances, p. 525); and the remaining sum was contributed by the Chicago & Northern Railway Co. and the Chicago, Burlington & Quincy R. R. Co.

If the City of Chicago should seek to compel the removal of this structure and the building of a subway beneath the tracks of the several railroad companies at this point, independently of some general plan of track elevation which may require the removal of this viaduct in order to enable it to be carried into effect, I am of the opinion that the court would hold that such action or attempted action on the part of the city would be unreasonable and that the city could not, except at its own cost, compel the removal of the structure and its replacement by a subway.

On the other hand, if the removal of this structure is necessary in order to carry into effect successfully some general plan of track elevation of sufficient importance to the public welfare and safety to justify the City of Chicago in directing the elevation of such tracks so that the removal of this viaduct and the building of a subway at this point would be merely an incident in the elevation of the tracks in question, I have no doubt but that the City of Chicago has full power to compel the elevation of such tracks and incidentally to order the removal of this viaduct and the building of a subway. This plan, however in this respect, would have to be reasonable in consideration of all the facts and it might therefore be that some question might be raised with reference to the cost involved in making the charge. That,

however, is not a question of power, but one merely concerning the reasonableness of the city's action.

Yours respectfully,

S. A. LYNDE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JANUARY 28, 1901.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At the regular meeting January 14th, 1901, your honorable body passed an order directing me to investigate the reputed, sale, lease, or transfer by the Ogden Gas Company of its property and privileges to the People's Gas Light and Coke Company, and to report to the Council whether or not such reputed sale or transfer was a violation of Section 13 of the ordinance of February 25th, 1895, granting to the Ogden Gas Company the right to construct, maintain and operate gas works within the City of Chicago, and whether such reputed sale or transfer worked a forfeiture of the Ogden Gas Company's rights under said ordinance.

Following the directions of this order I have examined the records of this county and have made inquiries of the officers and counsel of the Ogden Gas Company, and have obtained the following information:

January 8th, 1901, a mortgage was recorded in the office of the Recorder of Cook County, in Book 7,363, p. 1, from the Ogden Gas Company to the Farmers' Loan & Trust Company of New York, as trustee. This mortgage is dated November 1st, 1900. It conveys all the assets, rights, property, privileges and franchises of the Ogden Gas Company (except the franchise to be a corporation) now owned by it or hereafter to be acquired, as security for the payment of the principal and interest of \$6,000,000 first mortgage bonds of the Ogden Gas Company, dated November 1st, 1900, payable May

1st, 1945, bearing interest at the rate of five (5) per cent per annum.

In regard to these bonds and to the stock of the company I am informed by the officers of the company, in a communication I have received from them, that:

“All of the stock of the Ogden Gas Company (\$5,000,000) and all of its securities have been sold to a syndicate of individuals composed of residents of New York, Boston, Philadelphia and Chicago. . . . All of said stock has been lodged with a trust company to secure the performance by the Ogden Company of all the provisions contained in its mortgage to the Farmers' Loan & Trust Company of New York, . . . also to insure that the Ogden Gas Company will lay additional mains of pipes, make additional connections, install more meters, and develop and increase its business until it shall be selling at least 1,500,000,000 cubic feet of gas per year.”

As to the connection between the People's Gas Light & Coke Company (the so-called Gas Trust) with the Ogden Gas Company, or with the purchasers of its stock and bonds, the officers of the Ogden Gas Company inform me that the purchasing syndicate “does not own a majority of the stock of the People's Gas Light & Coke Company, nor any of its stock.”

It is further stated that:

“The company (Ogden Gas Company) has not sold, transferred, conveyed, disposed of, mortgaged, or leased directly or indirectly, any of its property, plant, mains, rights or privileges, or stock, to the People's Gas Light & Coke Company or to any other gas company.”

The issue of \$6,000,000 bonds, the pledge of the stock of the Ogden Gas Company to secure these bonds, and the covenants in the mortgage are intimately related with another contract, which to all intents and purposes forms part of the same general transaction. November 1st, 1900, the same date with that of the bonds and mortgages, the People's Gas Light & Coke Company entered into an agreement with the Ogden Gas Company by which the People's Company agreed to purchase all the property of the Ogden Company March 5th, 1945, as such property might then exist, for the price of

\$7,000,000. The Ogden Company agreed not to dispose of its plant or any additions thereto otherwise than in the ordinary course of business to enable it to carry on the business of manufacturing and selling gas. It further agreed to maintain its plant in good condition and repair, and from time to time extend and enlarge the plant and to distribute to consumers in each year subsequent to 1902 gas to an amount of not less than 700,000,000 cubic feet until the date fixed for the purchase of the plant by the People's Company. It was also agreed that if the Ogden Gas Company should default in payment of any of the principal or interest of the bonds already referred to, secured by the mortgage to the Farmers' Loan & Trust Company, the People's Company should have the right to pay any such sum so in default and to take credit for the amount so paid on the purchase price to be paid by it for the Ogden Gas property. In case the City of Chicago exercised the option given it under the Ogden Gas ordinance of February 25th, 1895, to purchase the plant of the Ogden Gas Company at the expiration of the term of its ordinance, the People's Company might under its contract with the Ogden Gas Company, on paying the purchase price of \$7,000,000 have the right to be represented in and to control the appraisement proceeding under said ordinance of February 25th, 1895, and to use for that purpose the money of the Ogden Gas Company and receive and receipt for any moneys which might be paid by the city under the appraisement.

Neither the officers nor the counsel of the Ogden Gas Company has shown any unwillingness to impart the foregoing information regarding these transactions. Upon this information there does not appear to be any technical violation of the terms of the ordinance of February 25th, 1895.

If, however, the sale were intended to be used as a cover for obtaining and keeping complete control of the Ogden Company, so that for all practical purposes the result would be the same as if the Ogden Company had transferred its property and rights to the People's Company, there would be no doubt a violation of the spirit of the provisions of Section 13 of the Ogden Gas Company's ordinance. The fact of the agreement by the People's Company to purchase in 1945, all

the property of the Ogden Company being used as security for the bonds and mortgages of the Ogden Company, and the contemporaneous character of the two transactions may be a mere coincidence, but the inference might not unreasonably be drawn that these facts all form part of one general transaction, the object of which is to place the control of the Ogden Gas Company where it was not contemplated under its ordinance it should be placed, namely, in the hands of another company. I have, though, no actual information sufficient to justify me in advising you at this time that a proceeding to forfeit the rights and privileges of the Ogden Gas Company would be successful.

It is only fair to call to the attention of the Council that the Ogden Gas Company's ordinance provides for a minimum manufacture and distribution of 60,000,000 cubic feet per annum, while the company is now manufacturing and selling 500,000,000, or about eight times the quantity required under the ordinance. Under the agreement by which the stock of the company has been placed as security for the performance of the conditions of the mortgage, the company must develop its business until it shall sell by 1920 at least 1,500,000,000 cubic feet of gas per annum. Under the contract with the People's Gas Company the quantity of 700,000,000 cubic feet per annum is the minimum quantity to be manufactured and sold each year after July 1st, 1902.

It is contemplated by these agreements, therefore, that the Ogden Gas Company shall continue in business as such and shall continually increase its output until at least the quantity of 1,500,000,000 cubic feet per annum is manufactured and sold. In doing so the Ogden Company would be compelled to increase its mains, to continue supplying gas through them at not to exceed ninety (90) cents per thousand, and to pay the three and one-half ($3\frac{1}{2}$) per cent per annum compensation to the city provided for in the ordinance. If, on the other hand, its franchise should be annulled and its property forfeited to the city, which of course could only be after a long litigation, any purchaser of that property from the city, under the present statute relating to frontage consents, could not acquire a practical right to lay additional

mains through which to distribute any additional supply of gas.

While it may reasonably be inferred that the Ogden Gas Company, in view of the agreements above referred to, will not become a formidable competitor of the People's Gas Light & Coke Company in the latter's territory, nevertheless it may be proper in connection with the subject matter to consider the obligations which by these agreements are left upon the Ogden Gas Company.

Respectfully submitted,
CHARLES M. WALKER,
Corporation Counsel.

JANUARY 31, 1901.

MR. ROBT. LINDBLOM, President Civil Service Commission.

Dear Sir:

In your favor of the 11th inst. you inquire whether in the formation of the eligible register of those who have passed the promotional examination recently held from patrolmen to detective sergeants under Section 10½ of the Civil Service Act, honorably discharged veterans are entitled to have their names placed at the head of the list. You further state that some of these veterans were given a preference as such in the original appointments as patrolmen.

No court in this State, so far as I am aware, has passed on the constitutionality of Section 10½ of the Act. In the case of *The People ex rel Maloney v. Lindblom*, 182 Ill. 241, it was contended that the Commission erred in holding that a veteran of the War of the Rebellion, honorably discharged, was entitled to preference under Section 10½ of the Act of 1897, on the ground that this section is unconstitutional. The Court refused to entertain the question on the ground that the Commission had jurisdiction, and if it erred in holding the Act to be valid, that ruling was mere error that could not be inquired into by a writ of certiorari. As to the decisions on similar Acts in other States, it is sufficient to say that they cannot easily be harmonized. It would not be altogether safe to hazard an opinion on which side of the question lies the weight of authority. For the purposes of this opinion, how-

ever, it is enough to say that the Act of 1897, known as Section 101½ of the Civil Service Act, stands upon the statute books as an existing law. Until a court of competent jurisdiction should hold it unconstitutional, it should be strictly followed by your Commission.

Your letter raises the point that the examination in question was an examination for promotion and that some of the veterans now asking preference were preferred in the original appointments as patrolmen. Section 101½ provides that:

"It shall be the duty of the examiner or commissioner certifying the list of eligibles who have taken the examinations provided for in this Act, to place the name or names of such persons (honorably discharged veterans of the War of the Rebellion) at the head of the list of eligibles certified for appointment."

No distinction is made here between open examination and an examination for promotion. I think the law intended that in both cases persons who had served in the naval or military service of the United States during the war of 1861-1865, and were honorably discharged therefrom, should be given preference upon the list of eligibles, "provided they are found to possess the business capacity necessary for the proper discharge of the duties" of the office, for appointment to which the examination is held.

Respectfully yours,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

MR. ROBT. LINDBLOM, President of Civil Service Commission.

Dear Sir:

Your letter of the 1st inst., asking for an opinion as to the legality of Section 5, Rule VI., of the Civil Service Commission, is at hand. You state:

"This rule was adopted after or about the time of the annexation of that part of Cicero known as Austin, and under said rule sixty day authority to employ two engineers for the

Board of Education has been granted and is still being granted, pending an examination for engineers for the Board of Education. The question arises whether the rule is in conflict with Section 10 of the Act."

Section 5, Rule VI., is as follows:

"Upon the annexation of any territory to the City of Chicago, persons then in the regular employment of the municipal government or school authorities which theretofore exercised jurisdiction over the territory so annexed, performing public service within such annexed territory, shall be eligible for temporary appointment to positions like those they held respectively, such temporary appointment to remain in force not exceeding sixty days and until regular appointments can be made under the provisions of the Civil Service Law, from eligible registers resulting from examinations in which citizens of such annexed territory have an opportunity to participate."

Section 10 of the Civil Service Act provides in part:

"To prevent the stoppage of public business or to meet extraordinary exigencies, the head of any department may, with the approval of the Commission, make temporary appointments, to remain in force not exceeding sixty days and only until regular appointments under the provisions of this Act can be made."

Section 6 of the Act provides for examination with "specified limitations as to residence", and Section 1, Rule III., provides that:

"No person shall be admitted to examination for any position . . . who has not been an actual resident of the City of Chicago for at least one year next preceding the date of examination."

There is no doubt but that Section 1, Rule III., is valid and was a proper rule for the Commission to adopt under the provisions of Section 6 of the Act. Under this rule residents of Austin, that is, of the annexed portion of the Town of Cicero, could not be admitted to examinations for the classified civil service of the City of Chicago until one year after the annexation of Austin. Such of them as occupied positions in the civil service of the Town of Cicero and were employed in

Austin, were upon the annexation of Austin deprived of employment, for the reason that their services were no longer required by the Town of Cicero, and, as you were advised by opinion from this department December 27th, 1900, they did not become members of the classified service of the City of Chicago.

This appears to be a case of great hardship, and, in view of the limitation as to residence allowed by Section 6 of the Act and prescribed by Section 1, Rule III., of the Civil Service Rules, I am of the opinion that it was perfectly proper for the Civil Service Commission to adopt a rule which would give persons who occupied positions in the civil service of the Town of Cicero and who lived and were employed in Austin an opportunity to enter the classified service of the City of Chicago. This is done by the provisions of Section 5, Rule VI., aforesaid. The annexation of another municipality, or portion thereof, to the City of Chicago may well be considered an "extraordinary exigency" contemplated by Section 10 of the Act.

I am therefore of the opinion that Section 5, Rule VI., aforesaid, is legal and is not in conflict with Section 10 of the Civil Service Act.

Respectfully yours,

ROSWELL B. MASON,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

MAY 20, 1901.

MR. F. W. SOLON, Assistant Superintendent of Streets, in Charge of Street and Alley Cleaning.

Dear Sir:

In answer to your letter of the 18th inst., in which you ask the Corporation Counsel whether the Northwestern Elevated Railroad Company may be compelled to keep the space under its structure clean, I beg leave to say that Section 16 of the special ordinance of January 8th, 1894, which granted permission to the Northwestern Elevated Railroad Company to

construct, maintain and operate an elevated railroad, provides:

“ . . . The space and surface of the ground under said railroad beneath girders and between columns, so far as the same is not occupied by the said railroad company, shall, by said company, be kept at all times free from all obstructions and in a clean and wholesome condition, to the approval and satisfaction of the Department of Health or health officers of said city.”

Special ordinances of Chicago, p. 943.

I would therefore suggest that you ask the Health Department to notify the company to comply with the terms of the above section. Should the company fail to do so, the city may do the work at the company's expense.

Very truly yours,

CLARENCE N. GOODWIN,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JULY 25, 1901.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

I have read the opinion of Mr. Armand F. Teefy, late Assistant Corporation Counsel, in regard to the validity of a special assessment for the construction of a system of sewers draining a part of the Sanitary District of Chicago into the Calumet River, and in addition to what has been stated in said opinion by Mr. Teefy, I beg leave to add only a very few words. I agree with Mr. Teefy that the mere fact that a part of the land sought to be drained by the proposed system of sewers is within the Sanitary District of Chicago, does not *per se* constitute a legal objection to the proposed improvement. The questions which will arise in such a case may be largely questions of fact, and will not involve difficult or controverted questions of law. If the system is so laid out that it furnishes drainage facilities to a district which needs the same, and excludes, so far as possible, land which does not need the improvement, the proceeding will, in my judgment, be sus-

tained. It will, however, in my judgment, be dangerous to include in such system any considerable tracts of unsubdivided land which are already adequately provided with surface drainage and which need nothing but surface drainage, or any large tracts of land which can plainly be better drained into the Drainage Canal.

My experience with a very similar improvement demonstrates the fact that there is a large amount of property and a large number of property owners in and about South Chicago who are suffering from the lack of drainage, and that, also, unfortunately, there is a large amount of unsubdivided property in the immediate neighborhood which not only does not need but will be actually injured by the building of a sewer. The vital defect in previous proceedings has been that a system has been devised which put into one project both of these kinds of land, and therefore from its very nature gave rise to serious controversy between the city and the owners of unsubdivided lands which did not need drainage, and whose owners naturally objected to paying a large proportion of the cost of an improvement which they did not desire and which could benefit only the owners of land differently situated. I am perfectly well aware of the great difficulty in devising a drainage system which shall meet the suggestions in my letter, but have discussed the matter thus fully because the real controversy will depend upon how these engineering problems are solved. If, for example, a drainage system could be devised which would include and assess only that land in and about South Chicago which needs a system of sewers, and which would exclude the unsubdivided lands which do not need such system, I am satisfied that all difficulties in the way of the improvement would disappear; but whether or not such a system can be devised is a matter upon which I offer no opinion.

Respectfully submitted,

EDGAR B. TOLMAN,

Attorney for Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JULY 26, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen :

Answering your letter of July 19th, 1901, in regard to the legality of "an assessment for resurfacing with asphalt, brick or granite, streets in the down-town district where the guarantee has expired, also where the guarantee has not expired," I beg leave to advise you that:

It has been decided so many times that a citation of authority is unnecessary, that a special assessment cannot be maintained for making repairs to a street. It has, however, been also many times decided that the mere fact that an improvement has once been made on a street, is in itself no legal obstacle to the spreading of a special assessment for making a new improvement. The question of what constitutes a new improvement is a question not of law but of fact. . . .

Now, while the law is well settled that you cannot spread a special assessment for the purpose of making repairs to a street, yet where the kind or quality of pavement is inappropriate, and competent municipal authorities decide that a different kind of pavement is necessary, no legal question can arise as to their power so to order. For instance, if it were determined that the granite pavement on certain streets was not adapted to public necessities, and that good public policy required the substitution of an asphalt pavement in lieu thereof, either for the conservation of the public health or for the purpose of preventing noise and disorder, such action would be undoubtedly within the power of the municipal authorities.

. . . .

Applying these general principles to the questions contained in your letter of July 19th, I am of the opinion that the streets in the down town district may be resurfaced and the cost thereof paid by special assessment, wherever such course can be supported by a reasonable public necessity; but wherever it can be shown that such an improvement (for example, the replacing of the worn out granite pavement by a new granite pavement of the same character) is merely necessitated by way of repairs or wherever it can be shown that the street is already paved with a pavement answering

all the necessities of public travel, so that the proposed improvement comes within the definition of an unreasonable and oppressive ordinance, objections may be sustained to the proceeding.

In connection with this subject the important question of public benefits is likely to arise whenever a change in the character of the pavement is dictated by public rather than by private necessity.

In my opinion the question as to whether or not the expiration of the guarantee upon the streets has any bearing upon the legality of the assessment, is not a question of law, but is a question of fact. If the pavement is in good condition and the guarantee has not expired, an ordinance for the repaving of the street will be much more open to the objection of being unreasonable and oppressive than in a case of a street where the guarantee has expired.

Respectfully submitted,

EDGAR B. TOLMAN,

Attorney for Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JULY 27, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Yours of July 26th, in regard to proposed sewer system combining property within and without the Sanitary District of Chicago, duly received. I am of the opinion that the mere fact of the combination of property within and without such district is not *per se* a legal objection to the validity of the ordinance. Thus understood, I am able to give you a definite answer, no, to your question as stated in your letter of July 26th.

This, however, by no means is conclusive on the question of whether or not such drainage scheme can be defeated. Whether it can or not depends upon questions of fact, concerning which I can, of course, give you no opinion. The ordinance will, like any other ordinance, although lawful upon

its face, be open to the objection that it is an unreasonable and oppressive exercise of legislative power on the part of the City Council, and if, as a matter of fact, such unreasonableness is proved, the proposed improvement will be defeated. The letter which I sent you on this subject before entered somewhat at length into the discussion of the elements which would be considered upon the question as to whether or not the city would likely be defeated upon such question of fact. On this point perhaps no written opinion would be so satisfactory as a personal interview, and if the Board so desires, I shall be very glad to appear before it and explain the matter more fully.

In regard to the question of an injunction at the suit of the Drainage Commission to prevent the discharge of the drainage into the Calumet River, Mr. Teehy's opinion seems to me clear, and I concur in it. The question here is probably one of fact. If the proposed plan results in contamination to the waters of the Calumet River and the lake, equity has jurisdiction to enjoin, and will do so, unless the land can be drained in no other way and the contamination is as little as possible. Land naturally draining into a stream or lake has a right to discharge even sewage and contaminating matter into such river or lake if it can be drained in no other way, but to embrace in one drainage project, land entitled to the right of drainage and not drainable in any other way, with land which can be drained another way, will not be permitted, and might invalidate the whole proceeding. This is one of the dangerous features which I discussed at some length in a former letter.

Very respectfully submitted,

EDGAR B. TOLMAN,

Attorney for Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

AUGUST 8, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Your letter of July 31st, 1901, together with enclosure

from the Deputy Comptroller and four vouchers in regard to the improvement of Wabash avenue, from Twelfth street to Twenty-second street, Warrant No. 25118, Docket No. 24695, received. I beg leave to state that, in accordance with your request, I called upon Mr. Oakley, of Wood & Oakley, attorney for the owners of said vouchers and other securities in the same proceeding, and received the benefit of his views, together with much information in regard to the condition of affairs.

I am of the opinion that "public benefits judgments" rendered in special assessment cases under Section 39 of the Local Improvement Act, as amended in 1901, cannot be included in the computation of the amount of indebtedness of the City of Chicago in determining whether or not the city is indebted beyond its constitutional limitation.

It is therefore a matter of the most vital importance that this indebtedness should not be converted into an indebtedness which is thus computed, and which therefore lessens the debt incurring power of the municipality. It is a matter of almost equal importance that the credit of the city and the merchantable character of special assessment bonds be carefully guarded. While it is reasonably certain what amounts of money will be collected from the property owners, and when, it is, under the present condition of affairs, quite uncertain when the amount of the special assessment represented by "public benefits judgments" can be paid. I think, therefore, that two forms of vouchers should be employed; one in the form now used by your department, which shall be drawn against that portion of the assessment levied against private property owners; another form of voucher which upon its face shall recite that it is payable from that portion of the said special assessment fund represented by the judgments for public benefits, whenever an appropriation has been duly made for the payment of said public benefits judgments, and the money paid into said special assessment fund, pursuant to said appropriation.

I suggest as a form for vouchers to be issued against public benefits, that the first paragraph of the voucher now in use be changed so as to read as follows:

"The City of Chicago will pay from that part of the special assessment warrant above mentioned, represented by the amount assessed against the City of Chicago, for public benefits (but only when and as said portion of said assessment is transferred to and paid into said fund by virtue of an appropriation ordinance for the payment of said 'public benefits judgments') the sum of _____ dollars, to _____, or order."

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney for Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

SEPTEMBER 20, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Your letter of September 11th, 1901, inquiring as to whether or not the alien and eight-hour clauses should be eliminated from your form of specifications duly received.

The provisions requiring the employment of union labor were held to be invalid in:

Adams v. Brennan, 177 Ill., 194;

Holden v. City of Alton, 179 Ill., 318.

I presume that these are the cases to which your letter refers. I am of the opinion that the case of *Adams v. Brennan*, *supra* is also conclusive as to the invalidity of the alien labor clause. The Supreme Court, in the last cited case, say, speaking of a resolution of the Board of Education for the employment of union labor only:

"It is plain that the rule adopted by the Board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work. * * * If such a restriction were sought to be enforced by any law of the State it would constitute an infringement upon the constitutional rights of citizens, so that the State in its sovereign capacity, through its Legislature, could not enact such a provision. . . . There is no more reason or justification for such a

contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the Board entertained a *bona fide* opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of a church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract. The fact that the Board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work.

“ . . . There is another ground upon which complainant has an undoubted right to maintain the bill, and that is, that the contract tends to create a monopoly and to restrict competition in bidding for work. The Board of Education may stipulate for the quality of material to be furnished and the degrees of skill required in workmanship, but a provision that the work shall only be done by certain persons, or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons and by excluding therefrom all others engaged in the same work, and such a provision is illegal and void. A taxpayer may resist an attempted appropriation of his money in execution of such a contract.

“ . . . No question concerning the merits of labor or trades unions is in any way involved in this case. The right of organization for mutual benefit in all lawful ways is not denied. The question is, whether the Board of Education has a right to enter into a combination with such an organization for the expenditure of the taxpayers' money for the benefit of members of the organization, and to exclude any portion of the citizens following lawful trades and occupations from the right to labor. It has no such right.”

The foregoing are cases where the question raised did not arise in special assessment proceedings; but in the case of

Fisk v. The People, 188 Ill., 206, both of said above cited cases were reaffirmed, in a special assessment proceeding, to-wit, an application for a judgment of sale for a delinquent special assessment. The Court there overrules an objection of this sort for the reason that the union labor ordinance was of date subsequent to the improvement ordinance, and that there was no evidence that the work was in any way affected by the void and unconstitutional ordinance. The Court says:

“If any bid or proposal had been made, or any contract had been entered into, by which the contractor, doing the work upon this improvement, agreed to hire only persons who are members of labor unions, a different question would arise.”

The Superior Court of Buffalo has passed directly upon the question, a similar clause in the laws of New York making it a crime for a contractor of a municipal corporation for the construction of public works to employ an alien as a laborer on such works. That Court held that such a statute is unconstitutional, as depriving a citizen of the rights and privileges contrary to the law of the land, and without the judgment of his peers, and depriving him of liberty or property without due process of law, and as contrary to the United States Constitution, Article 14, Section 1, forbidding any State to make a law which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of liberty or property without due process of law, and also as void as violating the treaty between the United States and the King of Italy.

People v. Warren, 34 N. Y. Sup. 942.

Similar laws forbidding the employment of Chinese have been held to be unconstitutional for similar reasons, and as violating the treaty with the Emperor of China.

Chamberlain v. Toy Long, 4 Sawyer, 36.

Baker v. Portland, 5 Sawyer, 566.

Taking up now the question of the eight-hour clause, the Supreme Court of Illinois, in the case of *Fisk v. The People*, *supra*, also passes upon the eight-hour clause, and after citing the eight-hour clause in full, the Court says:

“That part of this clause in the specifications, which

makes the contractor liable for a forfeiture of his contract, if he allows laborers or employes to work more than eight hours in one day, is unquestionably void and unconstitutional. It infringes upon the freedom of contract, to which every citizen is entitled under the law."

I am therefore of the opinion that the alien and eight-hour clauses should both be eliminated from your form of specifications.

Very respectfully submitted,

EDGAR B. TOLMAN,

Attorney for Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

OCTOBER 26, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Answering your letter of October 22d, in regard to the improvement of State street from Twenty-sixth street to Thirty-ninth street, in supplement to my opinion of October 18th, I beg leave to state:

As an abstract legal proposition, I am of the opinion that if there has been a due and regular public hearing and recommendation for a public improvement, upon which an ordinance has been passed, and this ordinance has for some reason been repealed, the repeal of the ordinance does not vitiate or effect the public hearing and recommendation, and that the City Council can pass a new ordinance based upon the same public hearing and recommendation as though the former ordinance had never been either passed or repealed.

So much upon the mere legal question involved. But a practical question arises, which must be determined, not as a question of law, but as a question of policy. To begin again from the beginning will tend to eliminate objections which might be filed, and arguments in court which might be made attacking the latter ordinance upon a theory opposed to the principles above enunciated, and it is always good policy to avoid even unfounded legal quibbles. On the other hand, you

will of course consider whether or not at the public hearing the improvement may not be defeated or at least stayed by petition.

Whatever decision you may come to, after weighing the considerations last above stated, will be in accordance with the law. You are therefore free to determine the matter as may seem to you best.

Very respectfully submitted,
 EDGAR B. TOLMAN,
Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

OCTOBER 26, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Your letter of October 23d, in regard to the improvement of Fifteenth street and Fourteenth place, from Canal street to Halsted street, duly received.

If the streets in question are approaches to viaducts erected across the tracks of the Chicago & Great Western Railroad Company, or its successors, built in accordance with Section 4 of the ordinance of May 13, 1872, Vol. 2, of the compilation of 1898, of the Special Ordinances of Chicago, pp. 443 and 444, then the cost of so much of said improvement as is upon said approaches cannot be paid by special assessment.

The decision of the Supreme Court of Illinois in the case of *McFarlane v. City of Chicago*, 185 Ill. 242, is conclusive upon this subject. The ordinance referred to in that case is nearly the same as the ordinance above cited. The ordinance there cited provided that the railroad company should "maintain and repair" the approaches. The ordinance here requires that the approaches should be erected, built and maintained at the expense of the railroad company. The omission of the word "repair" in this ordinance is of no consequence, as the decision of the Supreme Court cites with

approval the decision of other courts in many other cases where the only word used was "maintained."

You will note that I have made no examination whatever as to the physical facts—as to whether or not any of this improvement actually constitutes part of the approaches to the viaduct crossing the tracks of the above mentioned company, or whether it is merely an approach to an approach, my opinion not covering such a case. Your engineering department will undoubtedly have the information on that subject in complete detail.

Very respectfully submitted,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

NOVEMBER 9, 1901.

H. O. NOURSE, Esq., Superintendent of Water.

Dear Sir:

I have your letter of October 16, 1901, with which you enclose a copy of a letter dated September 3, 1901, sent to various places throughout the city where, in your judgment, water meters should be placed, also a copy of a letter dated October 3, 1901, intended to follow the first letter. You ask for an opinion "as to whether or not the Commissioner may shut the water off for failure to comply with notice to place meter as provided for in Section 11 of the ordinance, and if so, notwithstanding the fact that the taxes under the frontage plan had been paid for the current period."

In reply I beg leave to advise you that in my opinion the Commissioner of Public Works has the right to shut off water for a failure to comply with notice to place meter in such cases where by ordinance meters are required to be placed. The City Council is given by act of the Legislature authority:

"To make all needful rules and regulations concerning use of water . . . and to do all acts and make all such rules and regulations . . . for the collecting of any water taxes, rates, or assessments as the City Council . . . may deem necessary and expedient."

Unless it can be shown that the rule made by the City Council to the effect that certain establishments must place water meters, as provided for in Section 11 of the ordinance, is unreasonable, the courts will undoubtedly hold that under the ordinance as it now stands the Commissioner of Public Works would have the right to shut off the water from establishments refusing to place water meters in accordance with his directions. . . .

The notices which you enclose will be proper, in cases where such payment has been made, if changed so as to inform the persons upon whom they are served that the water will be shut off at the end of the period for which payment has been made.

Yours truly,

WM. H. ARTHUR,

Assistant-Corporation Counsel.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

NOVEMBER 15, 1901.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In reply to your request asking me to inform you who is the legal owner of "the interest on the funds in the hands of the County Collector and County Treasurer", I assume that your inquiry refers particularly to the interest, if any, which may have accrued to funds in his hands belonging to the City of Chicago.

The County Treasurer is the custodian of the public moneys of the county and the law requires him, by virtue of his office, to undertake and perform the duties of County Collector. Although he is compelled to give a separate bond as such collector there are not two separate offices. There is but one office and one salary, but with two different classes of duties, namely, those of Treasurer and those of Collector.

Kilgore v. People, 76 Ill. 548.

It is the duty of the County Treasurer to treasure the county's moneys and it is the duty of the City Treasurer to treasure the city's moneys; and the County Collector's duty

among other things is to collect the city's taxes and without demand "pay over to such (City) Treasurer as often as once in two weeks, from the time he shall commence the collection thereof, all such taxes as he shall then have collected, till the whole tax shall have been paid over."

Hurd's Statutes (1899), Chap. 24, Art. 8, Sec. 2.

"The County Collector shall report and pay over the amount of tax and special assessments due to . . . cities collected by him on delinquent property at least once in every ten days, when demanded by the proper authorities and persons."

Hurd's Statutes (1889), Chap. 120, Sec. 244.

In brief, it is the duty of the County Collector to collect and promptly pay over the city's taxes to the City Treasurer.

If instead of performing that duty according to law he withholds them and deposits them in some bank or banks in his name and thus or otherwise while such funds are in his control interest accrues thereto, the question is whether such interest belongs to him or to the city, and if to the city, how it may be recovered. [Here follows a discussion of the authorities on the subject.] . . .

From an examination of all the other cases that I have found I am of the opinion that, independent of legislative or constitutional provisions, the interest arising from deposits of public moneys is an increment to the fund and becomes a part of it, and that the fund so increased by interest belongs to the original owner, in this case, if interest or other compensation has arisen, the City of Chicago, and that the County Collector of Cook County, and the sureties upon his bond are liable to account to the City of Chicago therefor.

Lonsdale v. Church, 3 Brown ch. 40.

Supervisors, Richmond County v. Wandel, 6 Lans. 33.

State v. McFetridge, 84 Wis. 473.

And many other cases quite too numerous to mention.

As to the remedy the law (Hurd's Statutes, 1899, Chap. 120, Sec. 262) provides that cities aggrieved may proceed directly against collectors upon their official bonds.

I also beg leave to call your attention to the duties which the constitution and laws of this State seem to place upon the

county officials themselves in regard to the subject matter of your inquiry.

Section 9 of Article 10 of the Constitution provides that the Treasurer of Cook County shall receive as his only compensation a salary to be fixed by law, which shall in no case be so much as the legal compensation of a judge of the Circuit Court of Cook County. It further provides that said compensation shall be paid only out of the fees of the office collected; and that "all fees, perquisites, and emoluments (above the amount of said salaries) shall be paid into the County Treasury."

This salary by Section 31, Chapter 53, Hurd's Revised Statutes (1899), actually has been fixed by law at the sum of four thousand dollars (\$4,000) per annum. The same section provides that all the fees and emoluments received by the County Treasurer over and above the amount due him as compensation or services, stationary, and other necessary expenses, shall be accounted for and paid out upon order of the County Board, and that the county shall account for and pay over to the City of Chicago its just proportion of the same. Four thousand dollars (\$4,000), then, is all the compensation to which the County Treasurer and Collector is entitled. . . .

I am of the opinion that if any interest has accrued to or any compensation been paid for the use of funds in the hands of the County Collector collected by him for the City of Chicago, such interest or compensation belongs to the city; that under the decision in the Hughes case it is the duty of the County Board upon its next settlement with the County Treasurer and Collector, required by law to be made in December, to ascertain how much, if any, interest or compensation for the use of public moneys has been paid to the County Treasurer; and if any, that the county should, according to the letter of the statute, "account for and pay over to the City of Chicago its just proportion of the same." . . .

Yours respectfully,

CHARLES M. WALKER,

Corporation Counsel.

NOVEMBER 16, 1901.

MR. F. X. BRANDECKER, City Collector.

Dear Sir:

I have your communication of the 13th inst., with which you enclose a letter dated October 23, 1901, from C. C. Buchard, a license officer, in which he states that a certain junk dealer in town makes a business of employing several men to run junk wagons in his name and that these men pick up junk of all kinds and store same upon the premises and claim exemption from the junk dealers' license on the ground that they are merely holding these goods for a favorable market.

You ask for an opinion as to whether such persons should not be required to obtain a license as junk dealers.

In reply I beg leave to advise you that in my opinion they should. The object of the junk dealers' ordinance is to prevent traffic in stolen goods and to guard against the transmission of contagious diseases by the storing of material which has been exposed. To accomplish that purpose junk dealers are required to keep a record of all material purchased by them and are prohibited from dealing in certain articles, and the police are permitted to at all times inspect these records. If a junk dealer were allowed to hire other men who deal in junk in the manner described by you, the provisions of this ordinance might be avoided; and it would be impossible for the Police Department properly to supervise the business, as they would have no means of knowing where the various store-houses are located.

Respectfully yours,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

DECEMBER 2, 1901.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Answering your letter of November 23d, in regard to

interest on bonds delivered to the Gaffney & Long Construction Company, in repaving Lake street between Ashland avenue and Western avenue, Docket No. 23361, which said letter was addressed by you to the Honorable Charles M. Walker, Corporation Counsel, and by him referred to me for an opinion, I beg leave to state:

The Local Improvements Act of 1897, Section 86, provided that the improvement bonds given to anticipate the collection of the second and succeeding installments "shall not be dated or issued until at least sixty days after the installments out of which they are payable begin to draw interest." This section of the law was not amended in 1899, but by the act of May 9, 1901, it was amended so as to provide that the bonds "shall be dated and draw interest from the date of the issuance of the same." If the Gaffney & Long Construction Company became entitled to the issuance of these bonds before May 9, 1901, the question of interest on said bonds will be governed by the section of the law first above quoted, and the question arising is, when did the installments out of which said bonds were payable begin to draw interest.

Section 42 of the Local Improvement Act of 1897 provided: "All installments except the first shall bear interest from and after the date of confirmation until paid." This section was amended by an act in force July 1, 1899, in certain particulars not material here to be discussed, the only material consideration being that by the said amendment of 1899 the said section of the act of 1897 was repealed and the new section of 1899 came into force in lieu thereof.

If, therefore, the Gaffney & Long Construction Company became entitled to receive improvement bonds prior to May 9, 1901, said bonds should have been dated not earlier than sixty days after the date of confirmation of the original assessment; that is to say, the date of the bonds should have been not earlier than August 3, 1899. Whether or not said bonds should have borne a date later than that above stated is not a legal question, and it is therefore not within my province to decide; but if the contractor properly performed the work and became entitled to receive said bonds at all, he could insist upon their bearing date substantially the same

as the vouchers issued to him from time to time, provided, however, the date should not be earlier than August 3, 1899.

I found that vouchers in the aggregate amounting to \$15,000 were issued to the contractor on November 30, 1899, and that no other vouchers were issued until November 6, 1901, on which date a resolution by the Board of Local Improvements was passed accepting the work and ordering final payment. I am informed that the delay in issuing these final vouchers was due to a protest filed by property owners, but that the legal proceeding which said property owners instituted was finally determined against them. It would therefore be just and equitable for the Board to consider and determine upon what dates the contractor would have been entitled to his vouchers but for said protest, and if the Board sees fit, to reissue vouchers of the dates thus ascertained.

If, however, it should appear that the contractor was not entitled to receive his vouchers or bonds until after May 9, 1901, the date of the issuance of said bonds and the time from which the same should bear interest should be governed by the law of 1901. Section 42 of the law of 1901 purports, by the caption of the act, to amend Section 42 of the law of 1897, but, as above stated, Section 42 of the law of 1897, was repealed July 1, 1899, by the amendment of that year, and the attempted amendment by Section 42 of the Law of 1901 was therefore inoperative and void.

L. & N. R. R. Co. v. East St. Louis, 134 Ill. 656.

Section 86 of the law of 1901, therefore, is the only provision of the law of 1901 which need be considered, and this provides that bonds "shall be dated and draw interest from the date of the issuing of the same", but we are without any valid provision of the law to determine when said bonds shall be issued and dated, and, as above stated, I am of the opinion that in such case the bonds should bear even date with the vouchers issued during the progress of the work, as near as may be.

To summarize this somewhat complicated question, I am of the opinion:

First. The bonds should in no event bear date earlier than August 3, 1899, that being sixty days after the date of the confirmation.

Second. No part of the work having been accepted prior to November 30, 1899, vouchers having been then, for the first time, issued for \$15,000, I am of the opinion that not more than \$15,000 of said issue of bonds should bear interest earlier than November 30, 1899.

Third. If the contractor was justly and equitably entitled to vouchers by reason of work completed and done in good faith prior to November 6, 1901, the delivery of which said vouchers was delayed by reason of a protest of property owners which subsequently proved to be ill founded, the Board of Local Improvements may, in its discretion, now issue to the contractor new vouchers in lieu of those of November 6, 1901, for such amount and of such date as would have been just and equitable but for such protest, and the bonds should be dated and bear interest of even date with said vouchers, as near as may be.

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

DECEMBER 2, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Your letter in regard to sewer on the west side of Clark street between Winnemac avenue and Argyle street, No. 24199, duly received. I am unable to find any authority justifying the contention of the property owners assessed for this improvement, that the city has not full power to permit other property owners not assessed to connect their lands with said sewer. The suggestions in the letter of Alderman Blake, dated July 12th, as to whether or not property owners not assessed were obliged to pay for the privilege of connection, and as to whether or not the moneys paid for such privilege

belong to the property owners who have already paid for building the sewer, proceeds on a misconception of the theory of special assessments. The property owners are presumed in law to have paid only the amount which their property has been specially benefited by reason of the making of the improvement. It is therefore now an incontestable presumption of law that the property owners have already received full value for their assessment in the increased value of their property. The city, under its police power, has, in my opinion, entire and exclusive authority to decide how this sewer shall be used, and by whom, and if it desires to make a reasonable charge for the privilege of connecting with this sewer, it has full authority so to do, and the money will belong to the municipality, without any claim on the part of the property owners.

It should be noticed that this is not a case in which any drainage district has been created, and this opinion, therefore, does not extend to a similar question arising in the case of such district legally created.

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

DECEMBER 2, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

In regard to the matter of claims for extras which arise from the adjustment of the grade of newly constructed pavements with the grade of existing pavements of intersecting streets, I have the honor to state that, if this matter is included in the improvement ordinance, it must be fully and accurately described, or the entire improvement ordinance will be rendered defective. In order to be fully described, the engineering department will be obliged to ascertain, in advance, by preliminary survey, not only the exact grade of

the improvement itself, but the exact grade of every intersecting street at the points of intersection, and the amount of work necessary to be done to unite the said grades. Since only one-third of the field work actually done by the engineering department ultimately ripens into an improvement, the adoption of this method would lead to a very large additional cost in the engineering department.

It should further be borne in mind that the matter to be inserted in your ordinances covering these questions is of such a nature that it would have to be specially prepared in each case; that is to say, no printed form nor any uniform phraseology could be devised which would cover the case properly. A very large additional expense would thus also be necessitated. It has been suggested that bidders shall be advised, in making their bids for the improvement, that the price fixed shall cover any necessary adjustment of the new to the intersecting pavements. If this is done it must be plainly stated in the contract and specifications. This plan would assure you the benefit of competition upon this extra work, but a perusal of the specifications would disclose the fact that the bidder was actually bidding on something more than the improvement described in the ordinance and estimate of costs, and professional solicitors of "objections to application for sale" might quite likely avail themselves of this possible flaw to promote a great deal of expensive litigation. With this in view, I deem it my duty to advise you that nothing ought to be put into the specifications of any improvement which is not fairly included in the improvement ordinance or estimate of costs. If an item for this adjustment could be incorporated in the estimate of costs, it would bring the case into harmony with the decision of the Supreme Court in *Delamater v. City of Chicago*, 158 Ill. 575, and would I believe be the best solution of the problem, provided you are disposed to consider the risk of provoking objections to application for sale, justified, by the advantages which will arise by enforcing competition on these "extra" items.

If this question is of sufficient importance to warrant it I know of no way in which it can be safely decided, except

by preparing a test case and carrying it to the Supreme Court.

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

DECEMBER 2, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Your letter enclosing letter from the Honorable Clayton Mark, Vice President of the Board of Education, concerning special assessments levied against school property, duly received, and has been very carefully considered. You ask for an opinion as to the right of the city to levy a special assessment against property owned by the Board of Education.

The real estate in which the Board of Education is beneficially interested comes to it in two different ways; in the one case, property comes direct from the general government, and is familiarly known as school fund property, being Section 16, etc., or the lands acquired in exchange for the same; the other is real estate purchased by the City of Chicago for school purposes.

It has been decided that this school fund property, that which comes from the general government through the State, is not subject to special assessment. (*People v. Trustees of Schools*, 118 Ill. 52.) There has as yet been no decision affecting real estate purchased by the city for schools.

Property of the general government and of the State is not subject to special assessment, but property of the city and the county is so subject.

In re Mt. Vernon, 147 Ill. 359.

County of Adams v. Quincy, 130 Ill. 556.

County of McLean v. Bloomington, 106 Ill. 210.

Scammon v. Chicago, 42 Ill. 192.

I incline to the opinion that the logic of the cases last cited, if applied to the question under consideration, would

lead to a conclusion that while the school fund lands afore-said are not subject to special assessment, yet those lands purchased by the city, and the legal title of which is in the city, for the use of schools is subject to special assessment. There being no decision upon this direct point, it seems to me that it would be highly advantageous to prepare a test case on the subject.¹

I should consider it somewhat dangerous to omit from a special assessment roll school property purchased by the city and held for the use of schools, as an objection founded on this omission, if held good, could be taken advantage of by any property owner.

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

DECEMBER 3, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Answering your letter of November 26, 1901, requesting my opinion "as to whether or not employes who have been suspended and brought before the Civil Service Commission and tried and found not guilty, are entitled to their salaries from the time of the suspension until their reinstatement," I beg leave to state that:

This question has been fully and conclusively answered in the affirmative by the Supreme Court of Illinois in the case of *City of Chicago v. Luthardt*, 191 Ill., page 516. In that case the Supreme Court, affirming the Appellate Court, decided that city employes who are in the classified civil service are municipal officers within the meaning of the civil service act. The Supreme Court further said (page 523):

¹Note: The test case above referred to was made up and the Supreme Court decided the questions thus raised in favor of the city's contentions. (See *City of Chicago for the use of Schools v. City of Chicago*, 207 Ill. 37.)

“The legal right to the office carried with it the right to the salary or the emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited.”

And further, the court said (page 522):

“It not appearing from this record that the appropriation for the salary of his office has been paid to any one performing the duties of the office, appellee is entitled to recover.”

In this case the Supreme Court affirmed the judgment for the salary of Wm. H. Luthardt for the period of time intervening between his dismissal and reinstatement, and the reasoning is of conclusive force in the case stated in your letter.

This opinion in no way applies to suspensions for not exceeding thirty days, under Section 12 of the Civil Service Act.

Very respectfully submitted,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

DECEMBER 5, 1901.

HON. LAWRENCE E. MCGANN, Comptroller.

Dear Sir:

Answering your letter of December 2d to the Honorable, the Board of Local Improvements, which said letter was by said Board referred to me, I beg leave to state in answer to said letter and by way of supplement to my opinion of December 2d:

It now appears that the Board of Local Improvements on June 23, 1900, after the work for the improvement in question had been completed, determined that at that time (June 28, 1900) the contractor would have been entitled to final vouchers but for the protest of property owners referred to in my aforesaid opinion; and that said Board did accordingly issue vouchers dated June 28, 1900, two for the sum

of forty-five hundred dollars (\$4,500) each and two for the sum of forty-four hundred dollars (\$4,400) each, payable out of the second, third and fourth installments of the special assessment referred to in said opinion, Docket No. 23,361, Warrant No. 23,991, each of said vouchers providing for the payment of interest at the rate of six (6) per cent. per annum from the date thereof.

The issuance of these vouchers was a determination by the Board of the dates upon which the contractor would have been entitled to his vouchers but for said protest; and having been then duly issued and simply held in suspense, it is now not necessary that the Board should take the action suggested at the bottom of p. 2 of my said opinion.

The fact of the issuance of vouchers as above stated was not called to my attention at the time of writing said opinion. I now therefore conclude that the contractor is entitled to the delivery of bonds for the amount of said vouchers of even date therewith, to-wit: June 28, 1900; but the contention of said contractor stated in his letter of November 20, 1901, that he is entitled to bonds bearing interest from June 3, 1899, is not in accordance with the statute and is untenable.

Respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

DECEMBER 9, 1901.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

In compliance with an order passed by your honorable body at its regular meeting, November 18, 1901, and printed on p. 1,357, of the Current Council Proceedings, directing me to submit an opinion to the City Council whether or not it has the right to pass mandatory ordinances compelling the railroad companies to elevate their railroad tracks within

the city irrespective of any compromises between the city and the companies, and in doing so to keep all the public street crossings open, I have to say :

The Supreme Court of Illinois and the Supreme Court of the United States uniformly have upheld and given effect to the inherent police powers of the State to provide for the safety of the public in so far as the safety of the lives and persons of the people were involved in the operation of railroads. "The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people." (*Chicago, Burlington & Quincy Railroad Company v. City of Chicago*, 166 U. S. 226, quoting *N. Y. & N. E. Railroad Company v. Bristol*, 151 U. S. 556 (557). This court "Declared it to be clearly established that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts for the deprivation of property without due process or of the equal protection of the laws by the State are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals."

(And quoting from *Chicago & Northwestern Railway Company v. City of Chicago*, 140 Ill. 309.)

The latter case quotes approvingly the opinion in *T. P. & W. R. W. Co. v. Deacon*, 63 Ill. 91, in which the Supreme Court said :

"The State has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent among the rights reserved, and which must inhere in the State is the power to regulate the approaches to and the crossings of public highways, and passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community."

And *Illinois Central Railroad Company v. Willenborg*, 117 Ill. 203. . . .

In a more recent case involving the track elevation ordinance passed by the City Council of the City of Chicago June 24, 1898, requiring the Chicago, Burlington & Quincy Railroad Company to elevate its roadbed and tracks between certain points, the Supreme Court expressly recognized the power conferred upon the city to pass such an ordinance.

Chicago General Railway Company v. Chicago, Burlington & Quincy Railroad Company, 181 Ill. 605.

I particularly call the attention of your honorable body to the language used by the court in the same case relating to subways and street crossings:

“Municipal corporations and railroad corporations both derive their powers from the State. When a railroad company constructs its railway across the street of a city it must restore the street to such condition as not unnecessarily to impair its usefulness. If its crossing is so constructed as to prevent the passage along the street of any person or car or vehicle, which has the right to use the street, it does not restore it ‘to such state as not unnecessarily to impair its usefulness.’ So, notwithstanding the power which the city has over its streets, it must so exercise that power to raise their tracks, as not to interfere with the use of the streets or crossings by all persons entitled thereto.” . . .

I am of the opinion, therefore, that the city has full power to pass mandatory ordinances compelling the railroad companies to elevate their roadways in the city, wherever the public safety requires it to be done, and that in passing such ordinances, “notwithstanding the power which the city has over its streets”, and repeating the language of the Supreme Court in the *Burlington case*, “it must so exercise that power in the matter of compelling railroad companies to raise their tracks as not to interfere with the use of the streets or crossings by all persons entitled thereto.” (*C. G. R. Co. v. C. & Q. R. R. Co.*, 181 Ill. 605.)

Respectfully submitted,

CHARLES M. WALKER,
Corporation Counsel.

DECEMBER 9, 1901.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

Your honorable body at the regular session of November 18, 1901, directed that the Corporation Counsel "examine the ordinance granting the franchise to the South Side Rapid Transit Company, with reference to such company's responsibility to light the streets and alleys at the various intersections of its right of way with such streets and alleys; that he also consider the question of the right of the city under its police power to compel such lighting by the company; and that he report his findings to this Council at as early a date as practicable."

There are two questions involved here:

First. May the city compel the lighting by elevated railroad companies of that part of the street intersections which lie underneath their tracks?

Second. Might possible rights of the city in connection with the franchise under which this particular company claims to operate be injuriously affected by such action?

First. As a police measure the city has full power to compel railroad companies whose tracks intersect any streets above grade to provide sufficient lights for that portion of the street underneath their tracks. Provision is made for the exercise of this power in Sections 1763 and 1764 of the Revised Code of Chicago (1897).

Second. The proper title of the company to which reference is made in the order of your honorable body is the South Side Elevated Railroad Company. No franchise has ever been granted to this company by the City Council. It claims the right to operate as successor to the Chicago & South Side Rapid Transit Railroad Company under ordinances of March 26, 1888, April 2, 1897 and April 7, 1892 (Special Ordinances of Chicago, 1898, pp. 953 seq.). The earliest of these ordinances provided that the consent contained in the ordinance should never authorize any other railroad company to use the franchise therein granted to the Chicago &

South Side Rapid Transit Railroad Company. It is, however, claimed by the South Side Elevated Railroad Company that certain acts on the part of the city or its officers have recognized the right of the company to operate as the successor to the original grantee of the franchise. This question was considered in an opinion rendered by the Law Department August 6, 1901, to the Committee of the City Council on Streets and Alleys South, in which it was held that the South Side Elevated Railroad Company in taking possession of the property of the Rapid Transit Company and in operating under the franchises granted by the ordinance of March 26, 1888, did so in defiance of the provisions of that ordinance, and as to any subsequent recognition by the city of the rights of the new company as the successor of the old company, it could not be said with entire confidence that the company's claim was established.

To take such a step as is contemplated in compelling the company to light the street intersections and so take upon itself the burden of a certain outlay, would be said to add another to those acts of recognition under which alone the company claims any right.

I submit that it is for the Council to decide whether it wishes to pursue such a course until such time as the relations between the city and the company in question have been established on a definite basis.

Yours respectfully,

CHARLES M. WALKER,

Corporation Counsel.

DECEMBER 31, 1901.

CHARLES ALLING, Esq., Chairman Committee on Gas, Oil and Electric Light, of the City Council.

Dear Sir:

In reply to your letter asking for an opinion in regard to the ordinance of A. J. Sidder & Company, in which you ask whether signers can withdraw their names from a petition, I beg leave to advise you that in all cases where a petition is

required to be filed with the City Council containing the consents of property owners before action may be taken by the Council in granting rights to lay electric conductors, persons so signing have the right to withdraw their consents at any time before final action is taken by the City Council.

We have no decisions of the Supreme Court of Illinois on this point. It has, however, been decided by the Supreme Court of several other States, and in 1890, in a case before Judge Horton of the Circuit Court of this county, it was decided that signers of a petition to the City Council asking that franchises be granted to a street railway company could revoke their consents at any time before final action had been taken by the City Council.

I return herewith the papers which accompanied your letter.

Yours truly,

WM. H. ARTHUR,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

DECEMBER 28, 1901.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Answering the verbal inquiry of the Honorable, your Vice-President, and in confirmation of the oral opinion given before your Board on the 9th inst., I beg leave to say that, in my opinion, you cannot charge to the property owners, as part of the cost of an improvement made by special assessment, the cost of repairing old foundations where streets are to be resurfaced upon the old foundation and the water department or other departments cut through the foundation before the resurfacing for the purpose of relaying or extending water pipes, etc.

Nothing can be paid out of a special assessment fund except that which was included in the ordinance, or naturally to be inferred from the language thereof, and described in

the estimate of the cost of the improvement. (*Delamater v. Chicago*, 158 Ill. 578.)

Very respectfully yours,
EDGAR B. TOLMAN,
Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.
Corporation Counsel.

JANUARY 29, 1902.

HON. L. E. MCGANN, City Comptroller.

Dear Sir:

Your letter of the 27th inst. in which you ask for an opinion as to whether a special assessment warrant which has been divided into installments should be regarded as being one entire fund or as many funds as there are installments, is at hand.

In reply we beg leave to say that while each installment of a special assessment is to a certain extent a separate trust fund for the payment of bonds issued against that installment, yet it is also true that the entire assessment fund is also a trust fund for the payment of all bonds issued in payment of the improvement involved in the assessment.

The statute in providing for the payment of work by the issue of bonds, while carefully limiting the legal liability of the city to the disbursement of the amount collected, none the less pledges the credit of the city as a trustee for property owners and bondholders alike, and in the discharge of this trust the rights of neither class should be disregarded. While nothing should be done to increase the burdens placed upon the property owner, yet it is equally true that the moneys rightfully collected from the property owner should be used for the payment of the improvement, it being always understood that the law contemplates that all property owners shall be treated alike and that no single property owner shall ever be obliged to pay more than his proportionate share of the cost of the improvement.

Under the various special assessment laws that have been or are now in force the rights of contractors and their

assigns to the payment of vouchers and bonds and the rights of property owners to the payment of abatements or rebates may be affected, at least in many cases, by the division of a special assessment fund into installments. It should be borne in mind that it is often material to determine whether there is a deficiency in the particular assessment fund under consideration. In the decisions of our Supreme Court which relate in any way to this subject the rights of the owners of vouchers and bonds payable from the various installments of a special assessment fund and the rights of the property owners to abatements or rebates therein have not been sufficiently considered in their mutual relations to warrant the conclusion that the Supreme Court has decided that in cases where there is a deficiency in the entire fund the contractor's vouchers and bonds must be paid at all costs when due, even to the extent of using abatement or rebate moneys therefor or using moneys properly belonging to one installment to pay obligations outstanding against another. In the absence of such a decision by the Supreme Court the only safe course to pursue is so to conduct the distribution of special assessment funds as to protect to the fullest possible extent the rights of all parties interested therein. This can only be done, in our opinion, in cases where there has been or there may be a deficiency in the entire fund, by treating each installment of an assessment as a separate fund. In cases where it is apparent that there will be no deficiency in the entire fund, a transfer of the surplus in one installment to cover a deficit in another installment may and should be made. Such a transfer should originate with the Board of Local Improvements and the amount thereof and the installments affected thereby should be reported by that body to you—at least in cases where the declaration of abatements or rebates by the Board of Local Improvements has resulted in there being a surplus in one installment and a deficit in other installments so that claims outstanding against them are in danger of not being met at maturity.

The following is an instance where a transfer of funds could and should be made from one installment to another. In the case of Warrant No. 25,012 the abatements made by

the Board of Local Improvements in each of the four deferred installments caused a deficit in the funds credited to each of these installments to meet outstanding vouchers and bonds. There is, however, a surplus in the first instalment over and above the amount of all claims outstanding against it sufficient to make good the deficit in the four deferred installments of the warrant. As you were advised in an opinion from this department dated November 4, 1901, it is proper for you to credit to each of the four deferred installments sufficient funds from the first installment to make good the deficits in the four deferred installments caused by the abatement therein. As stated above this transfer should originate with the Board of Local Improvements and you should be notified of the particulars thereof by that body.

We have not deemed it necessary to lengthen this opinion by a citation of the statutory provisions which may be referred to in support of the proposition that each instalment is a separate trust fund, for the reason that we do not question the validity of those provisions of the statute; but we are of the opinion that these provisions are subordinate to the spirit of the whole act, and that each installment of an assessment is to be primarily regarded as a trust fund for the payment of the obligations issued against that installment, subject, however, to the controlling principle that the entire assessment is also a trust fund for the payment of all obligations lawfully issued against it, and that the former trust should yield to the latter whenever the entire assessment is sufficient to pay all obligations issued against it. So far as keeping the record of a fund is concerned it should be kept by installments and the transfers, if any, should be duly noted.

Respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

ROSWELL B. MASON,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

FEBRUARY 1, 1902.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Answering yours of the 24th inst. (your No. 1089), inquiring whether the acceptance of a tax certificate by the city makes the city liable to the special assessment warrant for the amount of such certificate, I beg leave to say:

Section 72 of the Local Improvement Act authorizes the municipality, in default of other bidders, to become a purchaser at the sale of property for a special assessment, and authorizes the city by ordinance to make it the duty of one or more municipal officers to attend at such sales and bid on behalf of the corporation. I assume that your letter refers to certificates of sale thus acquired, and if the certificates to which you refer in your said letter are not acquired in accordance with the provisions of the section referred to, this opinion does not apply.

Section 73 of the same act confines the contractor to the collection of the assessment, and provides that he shall have no claim or lien upon the city except from such collection. It further declares that a municipality "shall cause collections and payments to be made with all reasonable diligence," and further provides that "if it shall appear that such assessment cannot be levied or collected, the municipality shall not, nevertheless, be in any way liable * * * but shall * * * with all reasonable diligence, cause a valid assessment, or assessments * * * to be levied and collected to defray the cost of said work until all contractors shall be fully paid." Section 90 of the same act contains practically the same provisions as to holders of vouchers and improvement bonds.

Answering therefore your question, as I understand it, I am of the opinion that the city is not made liable to the special assessment fund merely by bidding in property at the special assessment sale and taking a certificate of sale for such property.

Another question, however, arises, not contained in your letter, but necessarily suggested thereby, to-wit: What is the meaning of the provisions above referred to in regard to

“due diligence”, and what should the city do, if anything, after purchasing the property at tax sale, and what other liabilities may it subsequently incur? The statute goes so far as possible in an attempt to relieve the city from any sort of liability, but I am of the opinion that it does not relieve the city absolutely from a liability which might arise from its default in the discharge of its duty to proceed with due diligence. In order to discharge its whole duty and relieve itself from any sort of liability, the city should in due time, and in strict accordance with the provisions of the statute, proceed to take out a deed upon the tax certificate and exhaust all the remedies of law for the collection of the assessment by the actual sale of the land, and by also instituting, in due time, and prosecuting with due diligence, all possible supplemental proceedings for the collection of such deficiency.

Very respectfully submitted,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

FEBRUARY 7, 1902.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Your No. 982, stating that there are deficiencies in certain special assessment funds to pay in full certain bonds drawn against such funds, and inquiring whether the moneys on hand should be pro rated or bonds paid in full in the order of presentation to the extent of the moneys on hand, duly received, and in answer thereto I beg leave to state:

First. There is no statutory provision in the Local Improvement Act, or elsewhere, in reference to this matter, and you are therefore free to pursue whatever course is directed by sound public policy.

Second. The objection to paying these bonds in the order of presentation is that it amounts to giving a preference to those who first present their bonds, and will precipitate a semi-annual scramble for position in front of your disbursing

window, which will not only be unseemly and injurious to the credit of the city, but will also embarrass the administration of your office and work a prejudice to those least able to protect themselves.

Third. Preliminary to the statement of any rule in regard to the payment of such vouchers, consideration should be first given to the principles laid down in the opinion dated January 29th; that is to say, you should administer each installment as a separate trust fund, unless and until it appears that there is a sufficiency in the whole assessment for the payment of all claims against the entire fund, and then, and not until then, you can transfer a surplus from one assessment to meet a deficiency in another.

Fourth. Another preliminary question arises in regard to the payment of abatement or rebate vouchers, if any such have been issued, against the fund; namely, shall they also pro rate with the bonds and the vouchers, or shall they be preferred or postponed to such bonds? No decision of the Supreme Court throws any light on this question and it must be answered by reference to the general principles of law and equity. The fundamental principle of the special assessment law is that no property owner shall be compelled to pay more than his proportionate share of the actual cost of the improvement. When this actual cost has been determined, and abatement or rebate vouchers for the refunding of overpayments to the property owners have been issued, these vouchers then represent money which the city has received and holds for the use of the property owner, free from any claim for the payment of the improvement. It cannot, therefore, be applied to the payment of bonds, and in such case I am of the opinion that the rebate vouchers are entitled to a preference in payment over the bonds or vouchers. It should, however, be carefully noted that this opinion is expressly confined to rebate vouchers issued under the present administration, where such overpayments have been kept in the city treasury and not paid out, and it is in no way intended to apply to cases under former administrations where rebate funds which ought to have been held for the use and benefit of the property owner, subject to return to him, have been

improperly diverted from the treasury and used for other purposes.

This opinion refers only to those cases where the overpayments of the property owners are actually in the city treasury.

Fifth. It should be further noted that in cases arising since the law of 1901, the question of rebates will not arise, as the Board of Local Improvements now declares its rebates in advance and deducts them from the assessment as soon as the actual cost of the improvement is determined, as a result of which the "rebate question" will in time entirely disappear. I therefore conclude as follows:

(a) That in the determination of this question you should first treat each installment as a separate trust fund, unless and until it appears that the total of all installments is sufficient to pay all bonds and vouchers, but that when this latter state of affairs exists, the lesser trust yields to the greater and the entire assessment is to be considered as a single trust fund.

(b) That rebate or abatement vouchers for the refund of overpayments are entitled to priority in payment over all bonds or vouchers.

(c) That improvement bonds, vouchers and interest coupons are entitled to share pro rata in the trust funds from which they are payable, and are to be paid pro rata and not in the order of presentation.

Very respectfully submitted,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

MARCH 21, 1902.

HON. LAWRENCE E. MCGANN, Comptroller.

Dear Sir:

Answering your letter of March 12, 1902, addressed to the Honorable, the Corporation Counsel, and by him re-

ferred to me, your No. 1314, subject—Improvement Bonds—I beg leave to say:

First. The statute provides that the City Treasurer shall call and select bonds for retirement unless some other officer has been designated by ordinance for that purpose. I can find no record of the passage of such ordinance, but recommend that one be presented to the Council imposing this duty upon the Comptroller.

Second. The selection should be of bonds to such an amount as equals the money collected and applicable to the payment of bonds of each series unmatured. The purpose of this provision of the statute is, that when property owners have taken advantage of the provisions of the last clause of Section 42 of the Local Improvement Act, and have paid in advance their entire assessment, thus terminating the interest charges against the property owner, this money may be available to retire the bonds which would have been paid by these payments in due course of time if the payments had not thus been anticipated. The purpose is to prevent the property owners' money remaining idle in the city treasury while the bonds to which it ought to be devoted carry interest. The selection of bonds ought therefore to be made from such series and for such amounts as bear a proper relation to the amount of advance payments on account of any and each installment. If, for example, there is a credit of \$2,000 to each installment, except the first, calls should be made of bonds to the amount of \$2,000 of each series, second to the fifth inclusive. Exactly the same principle ought to be applied to the selection of bonds to be called as would be applied in regard to the payment of bonds at maturity. If there is money on hand which ought to be devoted to the payment of bonds of a certain series at maturity, bonds for that amount, and from that series, should be selected by lot and called for payment.

Answering, therefore, the questions propounded, as follows, to-wit:

1. Who is the officer designated by law to make a call of such bonds and to select the particular bonds or series to be paid?

This question is answered by the statutory provisions above referred to, casting this duty upon the City Treasurer in default of any ordinance designating any other officer.

2. Can a particular series or particular bonds of a series be called (when selected by lot) when there is sufficient money in the warrant or installment to pay some, but not all of a series or all of the bonds of a series?

The answer to this question is, yes.

(a) Would this make any difference whether the bonds are held by one or different persons?

The answer to this question is, no.

(b) In selecting by lot the bonds to be paid, should the selection be made from all the bonds of all the series un-matured (in which case particular bonds of different series might be selected), or should the selection be so made that one series should be paid in full, when there is money sufficient, before the bonds or part of them of any other series are paid?

The answer to this question is, the selection should be made from the series for the payment of which there is money to the credit of the corresponding installment of the special assessment fund.

(3) Can a call of such bonds be made after January 10th of the year, either with or without consent of the holders of all the bonds?

In answer to this question I beg leave to say that I am of the opinion that a call of such bonds cannot be made after January 10th of any year, if the holders of the bonds so called object. Other bondholders cannot object, because the payment of bonds out of the moneys which ought to be devoted to the payment of those bonds, works them no injury. If after the bonds are called the holder consents to the call, it will be valid; if he objects, it will be invalid.

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

MARCH 21, 1902.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen :

Your letter of March 17, forwarding communication from Daniel Hardin in reference to deposit on bids for drains in Castello avenue, duly received.

You request my opinion as to whether or not the certified check accompanying the bid, and equal to ten per cent. thereof, should be based upon the number of feet to be laid or should also include ten per cent. of the cost of probable rock excavation. The language of the statute (Section 76) on this subject is as follows: "All proposals or bids offered shall be accompanied by cash or by a check payable to the order of the President of the Board of Local Improvements in his official capacity, certified by a responsible bank, for an amount which shall not be less than ten per centum of the aggregate of the proposal." The statute further provides "that no proposals nor bids shall be considered unless accompanied by such check or cash." The legislature in drafting this statute probably did not know that bids rarely contain specific statements of aggregate amounts.

The intention of the legislature, however, is clear; namely, that a check of ten per cent. of the actual aggregate cost, as stated in the bid, should accompany it. The Board should require a bona fide compliance with the purpose and intent of this law. Wherever the aggregate cost can be reasonably ascertained, additional items, such as rock excavation, should be included in the computation; but where, however, it is impracticable to ascertain in advance such contingent items as rock excavation, and check is offered in good faith for ten per cent. of a bona fide estimate of the cost of the improvement, the bid ought not, in my opinion, to be rejected on that ground alone. In such cases I think the Board would be justified, where the discrepancy is slight, to disregard it, or where the probable amount of such additional items can be ascertained with reasonable accuracy, to call upon the contractor for an additional deposit before rejecting his bid. If, however, a contractor submits a bid in which he entirely ignores important items of cost, which

any reasonable person of ordinary experience ought to foresee, and especially where, in the opinion of the Board, this omission is made in bad faith for the purpose of avoiding the requirement of the law respecting the deposit required to accompany a bid—in short, where such omission is willful or due to gross negligence, the bid should be rejected under the last of the above quoted provisions of the statute.

Very respectfully submitted,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

MARCH 22, 1902.

W. M. MUSHAM, Fire Marshal.

Dear Sir:

I have your letter of the 21st inst. in which you ask for an opinion as to your right to retire, under the provisions of the Firemen's Pension Fund Act, any men in the Fire Department who have become disabled or superannuated in the service and who are not Civil Service appointees.

The provisions of the Firemen's Pension Fund Act will be found on pp. 357 to 360, inclusive, of Hurd's Revised Statutes (1901 Ed.). Under this act members of the Fire Department may be retired if found to be physically or mentally permanently disabled by reason of service in the Fire Department, upon an examination by a medical officer ordered by the Board of Trustees of the Firemen's Pension Fund. Such retirement may undoubtedly be made without the consent of the person affected if the Board of Trustees of the Firemen's Pension Fund so determine. Members of the department may also be retired after becoming fifty years of age and having served twenty-two years or more in the department, of which the last two years have been continuous, upon their own application to be relieved. All retirements must be made by the Board of Trustees of the Firemen's Pension Fund and not by the Fire Marshal alone. There is no other method of retirement provided for by this act nor

is there any provision for retirement under this act except in the cases noted hereinabove. In case a member of the department who is fifty years of age and who has served twenty-two years or more in the department, of which the last two years have been continuous, is discharged, he is entitled to a pension.

I have not discussed the question of your right to retire disabled or superannuated members of the Fire Department who are not Civil Service appointees apart from the provisions of the Firemen's Pension Fund Act, as this subject was not included in your request for an opinion.

Respectfully yours,

ROSWELL B. MASON,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

APRIL 3, 1902.

THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Your auditor, Mr. William Tuttle, has called my attention to a matter of very great importance to the City of Chicago and to the holders of improvement bonds, and one which merits, and in fact demands, the immediate attention and appropriate action on the part of your honorable body.

In very many special assessment cases large sums of money have been paid by property owners in advance. These special assessment payments have lain in the city treasury, drawing no interest whatever, while the bonds against which these payments ought to be applied have been drawing interest. In many instances the deficiency thus created results in an entire disarrangement of the fund, to such an extent that deficiencies exist which cause defaults in the entire issue of bonds and coupons, besides resulting in a distinct and direct loss to the municipality and to the property owner. This condition of affairs is in no way chargeable to the Board of Local Improvements, but to a failure on the part of the proper official to call bonds for payment before matur-

ity where the money for the payment of these bonds has been received in advance; and this fault is not so much the fault of the officials as it is of the law. The Legislature very unwisely casts this duty upon the City Treasurer, but that official entirely lacks the information to enable him to properly call these bonds.

To take a specific case: In Warrant No. 24,006, Docket No. 23,477, bonds for the third, fourth and fifth installments mature respectively in December of 1902, 1903 and 1904, but in the third, fourth and fifth installments there was on hand December 31, 1901, \$3,762.35, \$4,428.28, and \$4,406.96, respectively. This condition of affairs, if no action is taken, will result in a clear loss of between two thousand and three thousand dollars, and will in this case result in a deficiency in the assessment, which if properly administered upon would not only pay all obligations, but would furnish a rebate to property owners of perhaps \$2,000.

This is only a sample case, but I am informed by Mr. Tuttle that he estimates that the city is losing about \$50,000 a year through such matters.

In view of the facts above stated, I recommend:

First. That an ordinance be prepared and presented to the Council, designating either the Comptroller or the Secretary of the Board of Local Improvements as the officer who is to call bonds in advance of maturity.

Second. That a systematic plan be devised and carried into effect, by which hereafter, whenever moneys are paid in advance in any assessment installment, bonds be called annually for the amount of such advance payments, according to law.

Third. That in regard to those matters which have heretofore not been called, a special investigation and report be made by the auditor and an effort made to locate the owner of these bonds, so that his consent may be secured to calling them for payment at once, without waiting until the time fixed by statute, to-wit, January 7th. This recommendation, however, is confined to warrants in which there is sufficient money on hand to call and pay bonds without creating a deficiency for other bonds or obligations.

Fourth. In Warrant No. 24,006, I find that the assessment will be sufficient to pay all obligations against the fund if the money on hand paid by property owners in advance can at once be devoted to the payment of bonds issued against the respective installments to which said advance payments are credited, and I recommend that a beginning be made here and that the auditor be instructed to locate these bonds, if possible, and negotiate for their surrender and payment at once. Every bond that can thus be retired will result in a saving to the fund.

Fifth. In the same matter a rebate for about \$2,000 has been spread upon the rebate books. This was apparently justified at the time, but the facts above referred to have caused an interest deficiency, above explained, which will eliminate this rebate, and unless the steps which I recommend are carried into effect, will produce in place thereof necessity for a supplemental assessment. This rebate order should be at once rescinded.

Very respectfully,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

APRIL 22, 1902.

MR. A. W. O'NEILL, Secretary Special Park Commission.

Dear Sir:

I have your letter asking whether the so-called "Township Consolidated Act" (Hurd's Statutes, 1901 Ed., p. 407), adopted at the last election, authorizes the successors of the township officers to issue bonds for park purposes upon the request of the Boards of Park Commissioners. I presume your letter refers to the issuance of bonds for the acquisition and improvement of additional small parks.

The act in question applies to all townships lying wholly within the city of Chicago. It provides that the City Clerk shall be ex-officio Town Clerk and Township Assessor, and the County Treasurer ex-officio Collector and Supervisor of each of such townships. It preserves all the towns as such and does not consolidate or abolish the towns. It merely imposes the duties of the former town officers upon a new set

of officers. It is perfectly clear that the town officers, who under the statutes are authorized to issue these bonds upon the written request of the Boards of Parks Commissioners, are now, under the act adopted at the last election, the City Clerk and the County Treasurer.

An act similar in principle, passed in 1877 and amended in 1893, providing for a modified township government when the city and township boundaries are coterminous and for the uniting of the offices of City and Town Clerk in one person and the offices of City Treasurer and Town Collector in one person, was sustained as constitutional in the case of *People v. Hazelwood*, 116 Ill., 319.

In answer to the question, What becomes of the town officers who were elected at the last election? I am of the opinion that their right and power to perform the duties of their offices were dependent upon the adoption of the so-called Town Consolidation Act. As this Act has been adopted by the people, they are *functi officio* and have no powers or duties to perform.

People v. Hazelwood, supra.

People v. Knopf, 183 Ill., 410.

The effect of the creation of the Board of County Assessors, sustained in this case, and the election and qualification of the Board was to deprive the Assessor of the Town of South Chicago of his duties and powers, and this, too, although he had been duly elected and had qualified as Assessor of the Town of South Chicago. . . .

Yours respectfully,

ROSWELL B. MASON,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JUNE 20, 1902.

WILLIAM M. BUTTERWORTH, Esq.,

Alderman Thirty-first Ward.

Dear Sir:

The request of the Judiciary Subcommittee for the opin-

ion of the Corporation Counsel as to what authority the elevated railroad companies have for using their respective stations for advertising purposes has been received.

The elevated railroad companies received from the city, by ordinance, the right to use certain streets for the carriage of passengers thereon and to erect structures for that purpose only. The ordinances contain no grant of the streets for any other purpose, nor was it contemplated that the streets should be used by them for any other business. It would not be within the power of the City Council to make a valid and binding grant of the streets for advertising purposes. The grant to the elevated railroad companies did not deprive the city of control over streets for every purpose which would not interfere with the right of the companies to maintain their equipment thereon for moving their cars and the transportation of passengers.

The city is given power by its charter "to regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, horse troughs, racks, posting handbills and advertisements."

Hurd's Revised Statutes, p. 268, Sec. 1, Sub. 17.

The power thus conferred is not in the least impaired by the grant to the elevated railroad companies to use the streets for their passenger traffic. The City Council may still regulate or prohibit the use of any structures erected on the streets for the general display of signs and advertisements except such as may be incidental to the public use of the railroads.

Very truly yours,

EDWIN WHITE MOORE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

JUNE 30, 1902.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

At the request of the Hon. Charles M. Walker, Corporation Counsel, I beg leave to submit the following suggestions.

in regard to the construction of a down-town subway system under the provisions of the Local Improvements Act, the cost of the improvement to be defrayed by special assessment.

The first question of law that arises is whether or not such subway is a "local improvement" within the meaning of the special assessment statutes. I am of the opinion that this question has been conclusively answered in the affirmative by our Supreme Court in a number of cases. In 1889 the City of East St. Louis passed an ordinance for the construction of a viaduct in Broadway, across several railroad tracks and the Cahokia Creek. The cost of this improvement was assessed in part against private property benefited and in part against the City of East St. Louis as public benefits. The objection was made in the trial court and in the Supreme Court that the improvement described was not a local improvement within the meaning of the special assessment statute. In answer to this objection the Supreme Court, speaking by Mr. Justice Wilkins, said:

"One of the powers conferred upon the City Council in cities by Section 62, Article 5, Chapter 24, of the Revised Statutes, is, 'to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets.' Also 'to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof.' We can discover no good reason for holding, that under these powers a viaduct like the one in question may not, in a proper case, be paid for by special assessment as a local improvement. The statute does not say what shall be considered a local improvement. The determination of that question is left to the City Council. . . . Acting within the scope of the power conferred by Section 62, *supra*, the City Council in cities, . . . are the judges of the utility of an improvement upon streets, and whether such improvement shall be treated as a local improvement in raising funds to pay for it. Their decision on these questions is final. (*Fagan et al. v. City of Chicago*, 84 Ill., 227.) Of course they must act reasonably and without fraud, otherwise their action will be void."

L. & N. R. R. Co. v. City of East St. Louis, 134 Ill., 656 (661-2).

The special assessment statute is especially constructed on the theory that improvements may have a double effect: *first*, that of increasing the value of private property; *second*, that of benefit to the city as a whole. The statute provides for an apportionment of these private and public benefits by the Commissioner and a review of his apportionment by the Court. The fact, therefore, that an improvement may be of great public value is no reason why it should not be considered as a local improvement within the meaning of the law. On the contrary, if there be elements of benefit to private property and of benefit to the municipality as a whole, the concurrence of these two elements brings the case absolutely within the statute.

Nor is it any objection that the public benefits may be greater than the private benefits. The statute makes no distinction whatever; it fits all cases where these two elements concur. Questions of principle are not affected by considerations of extent or degree. If the public benefit is more than the private benefit, still the private benefit must be ascertained, and it can be ascertained in no other way than by special assessment. The Supreme Court has also passed upon a point which seems to be conclusive here. An objection was raised that the private benefits were less than one-half of the cost of the improvement, and that the improvement was, therefore, a public and not a local improvement, but the Supreme Court said it was not a matter of consequence whether the benefits to the property were equal or no more than one-half equal to the cost of the improvement; whether it was one or the other did not nor could it change the amount that the property should be assessed for benefits.

Fagan v. City of Chicago, 84 Ill., 227-232.

It is worth while to note, in passing, that the statute above quoted by the Supreme Court in the East St. Louis case is still in force. It authorizes the City Council to construct . . . bridges, viaducts and tunnels. The Supreme Court there held that these viaducts might be constructed by special assessments. Is this not conclusive authority that under such statute "tunnels" may be constructed by special assessment? The terms "tunnel" and "subway" are synonymous terms.

From a review of the foregoing and many other authorities, I am clearly of the opinion that the Local Improvements Act now in force affords unquestioned legal authority for the construction of a system of tunnels or subways by special assessment.

The question, of course, will arise as to what proportion of the cost of this improvement should be assessed against private property thereby affected. The Special Assessment Act answers this question. It provides that property shall be assessed no more than it is specially benefited by the construction of the proposed improvement and no more than its proportionate cost thereof. It seems to me beyond all doubt that much of the down-town property will be enhanced in market value by the construction of such an improvement as that under contemplation, which will remove the street cars from the congested surface of the streets and give an unobstructed permanent pavement from curb to curb for wheeled traffic. The desirability of the removal of the present condition of affairs at the corners of Madison and State, and at the corners of nearly all other down-town streets where street car lines cross one another can hardly be questioned. Another element of benefit will be the furnishing of accessible portions of such tunnel or subway for water, gas and sewer pipes, where they can be reached for repairs, enlargement, and for the construction of new systems, without tearing up the pavement and excavating the street. Additional elements of benefit from such a system will suggest themselves without the need of further discussion.

The assessment to private property ought to be for such a reasonable sum as will fairly represent the increase of the market value of the property by reason of the improved condition thus arising. It should be no greater, and in the ascertainment of this sum the property owner should be given the benefit of the doubt. His assessment better be too low than too high. The balance of the assessment will, of course, be represented by public benefits judgments against the City of Chicago.

Against these two classes of assessments, private and public, improvement bonds may be issued in accordance with the

special assessment law. They may be either delivered to the contractor in payment of his work, or they may be sold and the contractor paid with the proceeds of such sale.

One of the most important practical questions is the saleability of these bonds. I am of the opinion that these bonds will be considered a very desirable investment and have a ready sale. The legality of the bonds is, I think, beyond question, but the special assessment proceeding for the construction of the subway can be quickly and easily taken to the Supreme Court before the work is done and before any bonds are issued, and the validity of the proceeding speedily passed upon. As the Supreme Court is now constituted, special assessment cases are usually decided in the Supreme Court within an average period of three months. If these bonds are declared to be legal, a proposition concerning which I have no doubt, the only question then remaining is as to their security. These bonds will have behind them a triple security; first, the City Council can, by separate ordinance, order that the total income from the subway shall be paid into the subway special assessment fund, to be used for the payment of interest and principal of said bonds. This security alone has been considered sufficient in two well considered proposals which have already been presented. The admirable plan proposed by Alderman Foreman rests wholly upon the income from the subway for the payment of the bonds. The plan contained in a request for a subway franchise to Messrs. Hempstead Washburne and William A. Alexander is also based entirely upon the proposition that the income from such subway will not only pay for the cost of construction but also a profit. In addition to the security aforesaid is the assessment against private property. Whether the same be large or small is of course a matter of future judicial determination, but in any event it is an additional security above and beyond that which is relied upon in the other two projects; and lastly, the assessment against the city, in the form of public benefits judgments, stands as a guarantee for the payment of whatever deficiency there may be after exhausting the other two sources of revenue. These public benefits judgments are of like force and validity as other judgments against the city, three million

dollars of which are now outstanding, all of which meet a ready sale at about ninety-five cents on the dollar. If judgments against the city in the city's present financial condition sell readily at so high a price, how can it be doubted that improvement bonds, secured upon the income of a subway, and upon assessments against individual property, and upon city judgments, will prove a most desirable investment? The law requires that the improvement bonds shall carry five per cent interest. In view of the high rate of interest, such bonds ought to sell at a premium.

There may be objections raised to the construction of a subway by special assessment by those who form their judgment of special assessments from the system as it obtained under prior administrations, and it may perhaps be not out of place to call attention to the striking reforms of the special assessment proceeding which have gone into effect since your incumbency in office. One of the chief scandals of the old special assessment system was the rebate question. Under the new law and the methods adopted by the present Board of Local Improvements, the rebate evil is entirely eliminated. There are no rebates. The assessment is made, as formerly, upon estimate of cost, but before the assessment is put into collection the statute requires the Board of Local Improvements, as soon as the work is completed, to file a statement of the actual cost of the improvement, and the assessment is then put into collection only for such actual cost. The system has also been radically changed in regard to interest. Formerly, interest ran against the property owner from the date of confirmation of the assessment, but was paid to the contractor only from the date of his voucher. Under the present system, however, interest is charged to the property owner only from date of the vouchers to the contractor, and this large overcharge of former years no longer exists. Formerly, a uniform six per cent was charged on every proceeding, for costs of the proceeding. This was used for the maintenance of the special assessment department, and under former administrations was often utilized for other corporate purposes. Now, nothing is charged to the property owner for costs of proceedings. All of the expense of the maintenance of the Board

and of the expense of the departments is paid by the city. The method of advertising for bids, of advertising awards, of the inspection of the work, and of the control and supervision of the work, is now all governed by a complete statutory code which removes the abuses of the former system. The only embarrassment which the city has to-day in regard to special assessment matters is in regard to those proceedings which were instituted under the former law. These difficulties are being removed, and in the near future the last special assessment fund will be adjusted and administered upon with due regard to the rights of all concerned.

Public sentiment seems to demand the relief of the congested condition of our streets by means of a subway. The construction of such subway by special assessment is, in my opinion, lawful. It seems to be the only method for the construction of such an improvement which does not actually surrender or at least incur the risk of surrendering the control of the streets to private franchise corporations. The bonds based upon such a method will be secured in a manner superior to any other municipal bonds which the city has ever issued. Such bonds will have all the validity of general municipal bonds, with the added security of the income of the subway and of the assessment against benefited property. The financial feature of this method, therefore, seems to be practical.

With a sincere hope that these suggestions may at least be of value in the consideration of one of Chicago's greatest problems, I remain,

Yours very sincerely,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

JULY 7, 1902.

MR. WILLIAM MAVOR,

Chairman of Committee on Finance of the City Council.

Dear Sir:

I beg leave to acknowledge receipt of your favor of the first instant, enclosing a copy of the communication, dated June 30, 1902, from the Mayor to the City Council.

In this communication the Mayor states that owing to the

increase in the receipts of the City Government from miscellaneous sources for the past six months it would be possible to give full pay to the members of the Police and Fire Departments for the current year. You ask whether this may legally be accomplished without violation of Section 2, Article VII., of the Cities and Villages Act, which provides for the passage, within the first quarter of each fiscal year, of the annual appropriation bill, in which the “. . . corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation. . . . No further appropriation shall be made at any time within such fiscal year,” etc.

The facts as to the Police Department are as follows: The appropriation bill, passed March 18, 1902, provides (Council Proceedings 1901-1902, p. 2344) for:

“Twenty-one hundred and seventy-eight patrolmen, at \$1,000\$2,178,000”

The number of patrolmen on the rolls of the department, however, is about twenty-four hundred. To keep all these men employed and at the same time to keep within the appropriation, an arrangement was entered into, at the voluntary request of the police officers, by which all the men were retained in the service. To meet the difficulty of the limited appropriation a system of vacations without pay was instituted, by which each officer agreed to accept a leave of absence which it was expected would not exceed thirty days in all. By this plan each officer would be paid at the rate of one thousand dollars (\$1,000) a year for the time actually employed. The force would be held at its full number. At the same time the unpaid vacations would protect the provisions of the appropriation bill. The same condition of affairs exists in the higher ranks of the police force and throughout the Fire Department.

The Mayor's plan is that an ordinance be passed by the Council “providing for full pay for the year for the full quota of men now on the payrolls of the Departments of Fire and Police.” This is proposed to be done by taking the money from the miscellaneous receipts, which, as disclosed in

the Mayor's communication, are much higher than was estimated at the time of the passage of the appropriation bill.

The question propounded is whether moneys derived by the city from sources other than taxation can be directed to be expended after the close of the first three months of the fiscal year, which begins January 1st.

The exact point here considered has not been passed upon until the recent decision of Mr. Justice Adams in *City of Chicago v. Berger*, 100 Ill. App. 158.

In this case the Court says:

"It is urged that the order of November 14th is invalid because not passed within the first quarter of the fiscal year. This objection premises that the order is an appropriation order or ordinance, which, in our opinion, it is not. The order is, we think, susceptible of the construction placed on it by the learned judge who tried the cause. He held that the words in the order 'deposited in the City Treasury to the account of track elevation' indicated that the amount so deposited, namely, \$10,000, was deposited by the railway companies, and was not money raised by taxation, and so expressed himself; and this was not denied by counsel for the city."

The transfer of the first five thousand dollars (\$5,000) to recoup the account of the Corporation Counsel for expenses incurred in track elevation cases, was, according to the Court

"... merely placing back in said legal expense account money which had temporarily been borrowed from it, and which legally should have remained in it. It was a legal transfer and not an appropriation. As to the remaining \$5,000, it was merely transferred to be used for the purpose for which it was deposited, namely, on account of track elevation, or, as provided by the order, to defray expenses in the preparation of defenses to actions for damages growing out of track elevation."

The case of *Chicago v. Nichols*, 177 Ill., 97, is often quoted against the power of the Council to appropriate after the first three months of the year; but it must be remembered that in the *Nichols* case no question was raised of any distinc-

tion between the appropriation of moneys received from taxation and those from other sources. It is well worth noting that the same chancellor, Judge Tuley, decided in the lower court both the *Nichols* and the *Berger* cases. In both he was affirmed. In the *Berger* case, at the close of the opinion, Judge Adams said:

“We fully concur in the conclusion of the learned judge of the trial court, than whom no one is more familiar with the law of the municipality.”

The contention that the appropriation bill of this year is greater in amount than the city's income with the increase from miscellaneous sources taken into account, and that therefore there is nothing left to be appropriated, is met by the answer that the proposed action of the Council is an amendment of the appropriation bill. If an appropriation of miscellaneous receipts can be made after April 1st, then any part of the appropriation bill dealing with the expenditure of miscellaneous receipts can be amended after that time.

We are of the opinion that the decision of Judge Tuley in the *Berger* case, approved by Judge Adams and the Appellate Court, justifies the view that at any time during the year an appropriation may be made, for a corporate purpose, from funds derived from miscellaneous sources.

Respectfully yours,

COLIN C. H. FYFFE,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER.
Corporation Counsel.

AUGUST 26, 1902.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

In your letter of recent date you state that the County Collector has withheld the sum of \$36,050.46 from the taxes collected for 1901 and has reported that this sum has been paid to the County Clerk in three equal amounts as his fee for extending the corporate, school and library taxes. You ask whether this sum has been legally withheld.

The Act of 1874, providing for fees of certain officers in counties of the third class, Section 4, provides, among other fees of County Clerks:

“For making transcript of taxable property for the Assessors, two (2) cents for each tract of land or town lot, and for extending other than State and county taxes, two (2) cents for each tax on each tract or lot, and each person’s personal tax, to be paid by the authority, for whose benefit the transcript is made and the taxes extended; and it shall be the duty of the County Clerk to certify to the County Collector the amount due from each authority, and the Collector, in his settlement with such authority, shall reserve such amount from the amount due and payable by him to such authority.”

Section 125 of the Revenue Act of 1872, as amended by the Act of 1893, provides that the County Clerk’s books shall “contain proper columns for the extension of the several kinds of taxes and other purposes.”

I think that it is not intended by the Act last quoted to permit the County Clerk to set aside a column for each rate which may be levied. To do so would not accord with the necessities of the case, which require nothing more than the separate extension of the taxes of each levying body.

The levy ordinance for 1901 levies, by its first section, a lump sum of \$18,404,142.02 as the total amount of appropriations for all corporate purposes of the city, for school purposes, and for the Public Library.

There is here only one levying body, and that is the city. It is true that the statute allows a levy of one mill on the dollar for the benefit of the Public Library, but the library is not a separate municipality or “authority.” The City Council is authorized, under the Act of 1872:

“To establish and maintain a public library and reading room for the use and benefit of the inhabitants of such city, and may levy a tax. . . . Such tax to be levied and collected in like manner with the general taxes of such city.”

I cannot find any ground for the extension by the County Clerk of the library tax separate from the general city tax, and the consequent collection of the fee of two cents an entry.

The same I think is true of that part of the city’s levy

which is made for school purposes. By Section 202 of the School Act of 1889, as amended by the Act in Force July 1st, 1899, a tax levy is provided for the purpose of establishing and supporting the schools, of two and one-half ($2\frac{1}{2}$) per cent for educational purposes and two and one-half ($2\frac{1}{2}$) per cent for building purposes. This is not levied by the Board of Education but by the "authorities" of the city. The Board of Education has no relations, in the matter of this tax levy, with the County Clerk. A communication is annually made by the Board of Education to the City Council, stating the amount desired. Then the City Council, in its single tax levy ordinance, includes the amount required for school purposes along with the levy for the city and Public Library.

As neither the Board of Education nor the library makes any levy, and as neither can be considered as a taxing "authority" in the sense in which that word is used in the statute governing the County Clerk's fees, I am of the opinion that the County Clerk is entitled to make only one charge for the extension of the taxes embraced in the levy of the city.

Respectfully yours,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER.

Corporation Counsel.

AUGUST 27, 1902.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

In answer to your letter of January 20th., 1902, enclosing a copy of the notice sent the Lake Street Elevated Railroad Company to comply with the Council order of July 1st, 1901 (page 675 of the proceedings of that date), requiring said company to remove certain signs from its platforms located on Lake street at Prairie avenue, Central avenue and Austin avenue, and in which you ask this department to see that said order is complied with, I beg leave to say that I find that the signs referred to are bill boards used for general advertising purposes and that the platforms themselves are placed in the

center of the street. I have carefully examined the ordinance under which the Lake Street Elevated Railroad Company is operating its road on this portion of Lake street and find that the ordinance nowhere gives the right to use the platforms located on the public street for advertising or other purposes not connected with the operation of a railroad. The location of the signs upon these platforms, therefore, constitutes an unauthorized and illegal use of the public streets, and you may lawfully remove them in compliance with the City Council's order.

Yours respectfully,
CLARENCE N. GOODWIN,
Assistant Corporation Counsel.

Approved:
CHARLES M. WALKER.
Corporation Counsel.

NOVEMBER 24, 1902.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Answering your letter of November 21st with enclosure from N. E. Murray, Chief Sidewalk Inspector, and notice from P. Sanders, both of which enclosures I herewith return, I beg leave to say the vault space under the sidewalks outside of the lot line, and within the street lines, belongs to the city, and the property owner has no rights therein. The legal measure of your rights with regard to the construction of the sidewalk in front of Mr. Sander's property is very plain. You have the right to fill the space under the sidewalk, but you have no right to fill, or in any way, enter upon, or put any material upon any portion of his lot. You can, therefore, build a retaining wall up to the lot line, and then fill in to said wall. The cost of this construction can, in my opinion, be legitimately allowed to the contractor as a necessary cost of the improvement as described in the ordinance. It cannot be charged specifically to Mr. Sander's lot.

Very respectfully yours,
EDGAR B. TOLMAN,
Attorney Board of Local Improvements.

DECEMBER 12, 1902.

CIVIL SERVICE COMMISSION, City of Chicago.

Gentlemen:

I have the letter of your Secretary of the 10th inst., asking the opinion of this department as to whether *all* the civil service employes of the Board of Education are subject to trial and discharge by said Board of Education without the approval of the Civil Service Commission. The letter states that some of the employes, such as engineers, janitors, etc., are not members of the pension fund, and the question is, whether the decision of the Supreme Court in 1898 in the case of *Brenan et al. v. The People* would apply to those not members of the pension fund and contributing thereto, as well as to those who are contributors to the fund.

The Legislature passed an act entitled "An Act to provide for the formation and disbursement of a public school teachers' and public school employes' pension and retirement fund in cities having a population exceeding one hundred thousand inhabitants. Approved May 31st, 1895. In force July 1st, 1895."

Laws 1895, Legal News edition, p. 220.

Section 1 of said Act conferred power upon the Board of Education in cities having a population exceeding one hundred thousand inhabitants and made it the duty of said Board to create such pension and retirement fund, and for that purpose set apart the following moneys, to-wit:

"1. An amount not exceeding one per cent per annum of the respective salaries paid to teachers and school employes elected by such Board of Education, which amount shall be deducted in equal installments from said salaries at the regular times for the payment of such salaries.

"2. All moneys received from donations, legacies, gifts, bequests or otherwise, on account of said funds.

"3. All moneys which may be derived from any and all sources: Provided, however, That no taxes shall ever be levied or an appropriation of public money be made for said fund except as herein provided."

Section 2 provided for the creation of a Board of Trustees for said fund and enumerated its powers.

Section 3 conferred power upon the Board of Education to retire by a majority vote of all its members any female teacher or other female school employe, who shall have taught in public schools or rendered services therein for a period aggregating twenty years; and any male teacher or male school employe, who shall have taught or rendered services for a period aggregating twenty-five years, and conferred the right upon any such teacher or school employe, after said term of service, to retire and become a beneficiary under the Act; with the proviso that three-fifths of said term of service shall have been rendered by the said beneficiary within the limits of the municipality where said Board of Education has jurisdiction.

Section 4 provided the annuity retired teachers or employes may receive.

Sections 5, 6 and 7 provided for the control of the fund and payments.

Section 8 provided for the manner of removal, and is as follows: "No teacher or other school employe, who has been or shall have been elected by said Board of Education shall be removed or discharged except for cause upon written charges, which shall be investigated and determined by the said Board of Education, whose action and decision in the matter shall be final. . . ."

The opinion of the Supreme Court in the *Brenan case* was filed December 21st, 1898. The amendment to Section 1 of the pension fund was adopted May 11, 1901, and went into effect July 1st, 1901. The original Pension Fund Act made it mandatory upon *all* school employes to contribute to said fund, and no provision was made until 1901 for a withdrawal therefrom.

Although the Legislature has by said amendment provided for withdrawals from the pension fund, nevertheless Section 8 of the Pension Fund Act remains in full force and effect.

As the Supreme Court said in the *Brenan case*, at page 632, in speaking of the power in the Board of Education to try

and discharge all teachers and employes as provided by Section 8 of the Pension Act:

"This exception is necessarily created by the later Act and may well have been made because of the purpose of the act to create, and preserve under the control principally of the Board of Education, for teachers and employes, a pension and retirement fund. *But whatever the purpose may have been, the Act must have its intended effect.*"

Applying this reason to this proposition, my opinion is that the opinion of the Supreme Court in the *Brenan case* applies to all employes of the Board of Education, notwithstanding such employes may not contribute to nor participate in the benefits of the pension fund.

Very truly yours,

WILLIAM H. SEXTON,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER.
Corporation Counsel.

DECEMBER 31, 1902.

MR. B. W. SNOW, Chairman Sub-Committee of Health of the
City Council.

Dear Sir:

Your request for an opinion whether the City of Chicago has the power to pass an ordinance regulating the location of hospitals has been referred to me.

The Act of Incorporation of Cities and Villages (Hurd's Rev. Stat. 1901, p. 270) contains no provisions granting power to municipalities in specific terms to regulate the location of hospitals. The authority to regulate the location of certain trades, occupations, and other things specifically enumerated, is expressly granted, but there is no mention by name of the word "hospitals" in any of these provisions. If, therefore, the power exists in the municipality to regulate the location of hospitals, it must be derived impliedly from some of these specific grants, or from some of the general powers expressly delegated to the municipality under which it would have the authority to exercise the general regulation of hospitals.

Among the powers expressly delegated under the Cities and Villages Act (Article V., Hurd's Rev. Stat. 1901, p. 285) the grants from which the city may seek to derive such power are the following:

"Par. 68. To regulate the police power of the city or village, and pass and enforce all necessary police ordinances.

"Par. 77. To erect and establish hospitals and medical dispensaries, and control and regulate the same.

"Par. 78. To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.

"Par. 83. To prohibit any offensive or unwholesome business or establishment within, or within one mile of, the limits of the corporation."

In these grants to the city the only mention that is made of "hospitals" by name is contained in paragraph 77. The question whether the power to regulate and control hospitals generally can be said to come within this paragraph may perhaps be doubtful.

If any hospitals from their nature can be shown to be offensive or unwholesome, or if it can be shown that any will necessarily become so by management or otherwise, I think paragraph 83 would apply.

But it must be borne in mind that hospitals generally are not offensive or unwholesome establishments *per se*. They are held to be wise and beneficent institutions to be fostered and encouraged by liberal legislation, and not to be suppressed or even discouraged by what may seem to be harsh or restrictive laws. However, even though a hospital is not, in itself, a nuisance, its management, location or other circumstances may cause it to become so.

Ex parte Whitwell, 98 Cal., 73;

Gilford v. Babies' Hospital, 21 Abb. N. C. (N. Y.), 159;

Bessioines v. City of Indianapolis, 71 Ind. 189; 15 Am. and Eng. Enc. Law (2d Ed.), p. 764.

Paragraphs 66 and 78 have been defined to be express authorizations to the city to pass all reasonable ordinances or requirements tending to promote the public health, comfort, safety, morals, convenience and welfare of the community.

Gundling v. City of Chicago, 176 Ill. 340, 348.

Wice v. The Chic. & N. W. Ry. Co., 193 Ill. 351.

Whether the power to regulate the location of hospitals is derived from one or both of these paragraphs is immaterial, as an ordinance may derive its validity from several different grants of power and not depend solely upon any single section or clause of a statute.

Gundling v. City of Chicago, 176 Ill. 340, 343.

The power conferred by these provisions is certainly broad enough to cover every necessary police power which the city may require to enable it to exercise a reasonable regulation of the location of hospitals.

And such regulation is held to be a proper exercise of police power.

Milne v. Davidson, 5 Martin (17 La.) 909.

Commonwealth v. Charity Hospital, 198 Pa., St. 271.

Ex parte Whitwell, 98 Cal. 73.

I am of the opinion, therefore, that the City of Chicago has the power reasonably to regulate the location of hospitals. I think, however, the city has not the authority, under the police powers, to prohibit hospitals generally as a class from any designated locality. But the city has the undoubted right to prohibit from certain localities, as dwelling neighborhoods, hospitals which would be *per se* nuisances in those districts, such as hospitals admitting patients with contagious or infectious diseases; or hospitals which from their character would, in their conduct and management, necessarily be injurious to the health, comfort, safety, morals, convenience or general welfare of the public.

In this view, the question becomes a mixed one of fact and law—fact as to what are the alleged offensive or injurious features of the hospitals to be prohibited; and law as to whether these objectionable features, as matter of law, are of sufficient degree to constitute such hospitals offensive or injurious.

In considering this question, one cannot ignore the fact within the knowledge of all that the public health, the public comfort and the public welfare may be endangered by the unrestricted location of certain classes of hospitals.

The case of *McCracken et al. v. Englewood Hospital et al.*, decided in July, 1899, by Judge Abner Smith of the Circuit Court of Cook County, supports the conclusions I have reached. In that case a bill for injunction was filed by adjoining property owners to restrain the erection and maintenance of the Englewood Union Hospital, which was a private one, on the ground that the owners of the hospital had not complied with the provisions of the ordinance requiring the consents of property owners to be obtained. Judge Smith held that the ordinance was invalid, and refused the injunction. No appeal was taken from this decision.

Judge Smith did not write an opinion in the case, but in dismissing the bill delivered a brief oral opinion:

In support of the views I have expressed, I have prepared a brief of authorities which is too voluminous to include in the opinion, but which has been filed in this office, and may be examined by the committee if it should so desire.

Very truly yours,

FRANK JOHNSON JR.,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

DECEMBER 31, 1902.

JOHN A. MAY, ESQ.,

Secretary of Board of Local Improvements.

Dear Sir:

Answering your letter of December 16th, 1902, I beg leave to say that there is ample statutory authority for levying as many successive supplemental assessments as may be necessary to meet the actual cost of a local improvement. (Section 59, Local Improvements, Act of 1901.) As a general rule, therefore, successive supplemental assessments should be brought until provision is thus made for the total cost of the improvements. When, however, the amount of the deficiency caused by the sustaining of objections to a supplemental assessment, or reductions allowed by the Court on the trial of a

supplemental assessment, is less than the cost of another supplemental proceeding, in such case I entirely agree with you that, as a matter of sound policy, the Board may determine whether or not it will save the city this larger sum (the costs) by allowing the lesser sum (the deficiency) to be assessed against the city as public benefits. The attorney who may hereafter be assigned by me for the trial of assessment calendars will hereafter be directed, in accordance with your suggestion, to confer with you, when any such contingency presents itself.

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JANUARY 2, 1903.

MR. J. E. SCULLY, Chairman of River, Harbor and Bridges
Committee of the City Council.

Dear Sir:

Your letter of recent date, with attached form of ordinance authorizing the issuance of tunnel improvement certificates, has been referred to us by the Corporation Counsel, and in response to your request for an opinion as to its validity, we beg leave to say:

Said ordinance in its present form is, in our opinion, open to the objection that it pledges for the payment of said certificates a present income of the City of Chicago, to-wit: certain license fees which the city is now receiving from the street railway lines which now use the Washington and La Salle street tunnels. For the purposes of this opinion it is assumed that the city is now indebted to the full limit of its constitutional indebtedness. It therefore cannot pledge any present income. (*City of Joliet v. Alexander*, 194 Ill., 457, 463.)

You state that the proposed plan for lowering said tunnels requires the entire destruction and removal of the present tunnels and the construction of new tunnels, and that from an engineering standpoint there is no possibility that the work

could be regarded as reconstruction, alteration or repairs. Our opinion is therefore founded upon the assumption that the question stands in the same condition as though there were no tunnels at Washington or La Salle streets, and as though the question were with regard to a new and independent construction.

Clause 28, Section 1, Article V., Ch. 24, R. S., Ill. (Hurd's 1902 Ed., page 286), gives the city authority "to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof." There is therefore no doubt as to the general grant of power. The first question necessary to be considered is the effect of Clause 5 of the same section and Section 12 of Article IX. of the Constitution of 1870, prohibiting cities from becoming indebted in any manner or for any purpose to an amount exceeding five per cent on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes.

The latest utterance of the Supreme Court of Illinois upon this question, and the only case in this State in which these questions are directly involved and discussed, is the above cited *case of the City of Joliet v. Alexander*.

Briefly stated, the facts in the Joliet case were that under the authority of an Act of the Legislature (Laws of 1899, page 104) the City of Joliet passed an ordinance for the issuance and sale of water fund certificates, the proceeds of the certificates to be used for constructing additions to the then existing city water works, and to be secured, not only upon such additions, but also upon the entire plant and upon the income arising from the water works system as thus enlarged. The City of Joliet was then indebted largely in excess of five per cent of the last assessed value of the taxable property therein. A bill for an injunction was filed to restrain the issuance and sale of such certificates, and because of the fact that the transaction resulted in an encumbrance of the existing water works plant as well as the additions thereto, and operated to pledge not only the income from the extensions thus proposed to be made, but also from the entire water works system, old and new, the transaction was held to constitute the incurring of an "indebtedness", even although the city was not thereby

made generally liable and although the certificates were payable only out of the water works fund. Throughout the opinion emphasis was laid upon the fact that the city owned an existing water works from which it was deriving a present income, and that the transaction might result in the losing of property then owned by it. The Court then said: "What is said relative to mortgaging property owned by the city or pledging its existing income is not intended to apply to a mortgage purely in the nature of a purchase money mortgage payable wholly out of the income of property purchased or by resort to such property." The Court also said: "The principle involved in special assessments, under which the warrants issued by a city do not constitute indebtedness of a city, cannot be applied to this case. The city is in no way liable for their payment and never owns the fund out of which they are paid. . . but in this case the holders of certificates would have a right to take and appropriate a pre-existing income of the city for the payment of the certificates and also to enforce payment by a sale of property of the city. The certificates would be in no sense chargeable upon the property of individuals, but solely upon the income and property of the city, including property already owned by the city."

The philosophy of this opinion seems to be that a city performs an act equivalent to the making of an indebtedness when it encumbers existing property or pledges an income therefrom, because it puts itself in a position where it is liable to lose something already possessed by it or an income therefrom which might be devoted to the payment of its existing debts. The language of the Court and its course of reasoning contains clear authority for the execution of what might be called a purchase money mortgage for the acquirement of property not previously owned by it, which it is lawfully authorized to purchase, and the pledging of the income therefrom, for the payment of the purchase price thereof. In the *Joliet case* there was statutory authority to purchase water works and pledge the property and its income for the payment of the purchase money. In the matter now under consideration by you, namely, tunnels under the river, there is no express statutory authority to purchase tunnels con-

structed by others. The authority is to construct tunnels. We have been forced to the conclusion that where due statutory authority exists for both methods, there is no sound distinction between the execution by the city of purchase money mortgages to secure the purchase of property and the issuance in advance of certificates secured on improvements to be constructed by it, and upon the income to be derived therefrom. The logic of the *Joliet case* seems to justify one form of transaction as well as the other. Neither transaction falls within the acts condemned; that is to say, neither of them pledges an existing property or income; neither of them can possibly endanger the loss of anything which the city owns.

We therefore conclude that the passage of an ordinance which authorizes the issuance of certificates to be sold for the purpose of procuring funds with which to construct tunnels, and to be secured upon the income from the tunnels thus to be constructed, said certificates to be payable only from said income, and from no other source, the ordinance creating them, and the trust deed securing them to contain apt clauses protecting the city from the possibility of the incurring of any general liability payable from any other fund, would not be held to be the incurring of a debt prohibited by the constitutional and statutory provisions above referred to, limiting the debt incurring power of the city.

We have thus resolved in favor of the legality of your project all of the questions which have thus far been presented, but now we come to a fundamental difficulty upon which we have been unable after the most careful investigation, to find any adjudicated case in our own Supreme Court reports or in the decisions of any other State or Federal court, where similar statutory conditions exist. This question is a fundamental one and involves the subject of power. Statutory power does exist to "construct tunnels", but the power cannot be exercised without money with which to meet the expenses of construction.

To procure this money it is necessary to borrow. Statutory power does exist to borrow money on the credit of the municipality for corporate purposes, but in our present con-

dition we are, it is assumed, prohibited from making this sort of an indebtedness. Can we then borrow money, not on the credit of the municipality, payable by general taxation, but on the credit of the income of the thing to be constructed, the lender waving the pledging of the municipal credit, and the right to be repaid out of general taxes? Does the statutory power to borrow money on the credit of the city, to be repaid by general taxation, authorize, by necessary implication, the right to borrow money on the credit of the special fund arising from the thing to be constructed with the proceeds of the loan? To this question two answers might be given, one an affirmative answer, which could only be supported by the argument that the power to borrow money on the general credit of the municipality includes by necessary implication the power to borrow on the credit of a special fund; the other, a negative answer, supported by the argument that the enumeration of the particular methods fixed by the present statute excludes all other methods and by the argument that the municipal authority is limited to powers expressly conferred by statute and to those necessarily implied thereby. (*Coquard v. Village of Oquawka*, 192 Ill. 355-365.) In the only case which we have found supporting an affirmative answer to this question, the Court by express language declined to pass on the fundamental question of power and limited their real decision to that of the effect of the debt-limiting provisions of the law. (*Winston v. Spokane*, 41 Pac. Rep., 888.)

In view of the total absence of judicial decisions on this most vital question, and the possibility of the decision of this open question either way, we deem it prudent, before any action be had by the City Council, that you secure from the Legislature express statutory authority for the borrowing of money by municipal authorities on the credit of the income to be derived from the thing to be constructed with the proceeds of the loan. If you and your committee concur in this suggestion, we place ourselves at your service for the preparation of a bill to be presented to the next session of the Illinois Legislature. The passage of an Act as above indicated would, in our opinion, remove all obstacles to the right of the City

Council to pass a valid ordinance to effectuate your committee's plan.

Very respectfully,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JANUARY 2, 1903.

WILLIAM B. WICKERSHAM, ESQ., Secretary of Library Board.

Dear Sir:

Your letter of October 23d, addressed to the Corporation Counsel, has been referred to the undersigned, together with a copy of a letter from Mr. Harry G. Selfridge, dated October 18th, 1902, relative to repaving the streets around the Public Library Building with asphalt.

In answer to your question as to whether or not the city will join with the private property owners in paying for the paving of the streets around the Public Library Building, by private contract, I beg leave to inform you that the City of Chicago cannot lawfully make this improvement in the manner proposed. No appropriation has heretofore been made for any such purpose, nor is there any appropriation now existing out of which money can be drawn by the city for such a purpose.

In answer to your inquiry as to what the rights of the Board are in such a case, I have the honor to refer you to the opinion of this department, dated January 28th, 1902, in which it is held that, since the City Council is by statute authorized to levy a tax for library purposes, to be levied and collected *in like manner* with the general taxes of the city, and since the general taxes must, by law, be levied by an ordinance which specifies *in detail* the purpose and the amount of the appropriation, the same rule holds good as to the levy for the public library.

The city is not authorized to enter into any private con-

tract for the construction of any work which creates a liability in excess of five hundred dollars without advertising the work and awarding it to the lowest and best bidder. It would not, therefore, be able to enter into any contract for the paving of the streets about the Public Library, unless said work was duly advertised by the city and awarded to the lowest bidder. This would prevent the city from becoming a party to the making of a contract based upon an award, resulting from bids solicited by private individuals. The Library Board is not a separate municipal corporation, but is a department of the municipality, exercising delegated powers, and ought not to assume to exercise power which the city does not possess. If the city cannot pave the streets by private contract without advertisement and competitive bidding and an award, the Board ought not to assume such power. If there be an urgent necessity to pave the streets about the Public Library, a method can be devised for the paving of these streets by special assessment, in which an equitable adjustment can be made of the cost of the improvement, so that the Public Library Board may pay such a portion thereof as is equitably to be regarded as of benefit to the library property, and the city can pay as public benefits the portion of the cost of the improvement which represents benefits to the community in general. The ascertainment of this division of the cost can be discussed with the Finance Committee and the Superintendent of Special Assessments, and an equitable arrangement reached, or the work can be done pursuant to an ordinance directing that it be paid for by general taxation and the items inserted in the next appropriation bill of the city and of the Library Board for payment of the relative amounts which may be agreed upon, and the contract then advertised according to law, and paid for out of the taxes collected during the year 1903:

Very respectfully,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JANUARY 10, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

I have the honor to present the outline of a plan to protect the credit of the city, lessen the cost of improvements constructed by special assessment, by bringing special assessment bonds to par, and pay defaulted bonds, vouchers and rebates.

This plan is not wholly original with me, but is the result of conferences with yourself, the Corporation Counsel, the Secretary of the Board of Local Improvements and others.

Before outlining any program it is advisable to understand the present situation and the nature of these obligations.

An improvement bond is by law made payable only from the special assessment when collected, and is therefore not a debt of the city, but is in reality the debt of the property owners whose property is benefited by the construction of the improvement. The direct liability of the city is limited to the payment of the amount assessed against it as "Public Benefits." The duty is also imposed upon the city, as a trustee, to use due diligence in the collection of the assessment, and to properly administer the trust fund, when and as collected.

Almost the only causes of defaults in the payment of special assessment bonds, under the new law as now administered, are as follows:

First. Non-payment of assessment by property owners or delays in such payments pending appeals and other litigation founded in ninety-nine cases out of one hundred on mere technicalities.

Second. The retention of special assessments collected by the County Treasurer until the end of each year, large payments being made to him during May, June and July of each year, which terminate the running of interest on the assessments, while interest continues to run on the bonds.

Third. Unavoidable delay in the confirmation of supplemental assessments, where the original assessment is less than the actual cost of the work.

Fourth. The lack of any practical method of promptly

realizing upon assessments enforced by sale where the property is stricken off to the city in default of bidders.

Under the old law, however, and under former administrations, there were other and much more serious causes of defaults, the results of which are still felt. The principal of these are as follows:

First. All those above referred to in greatly increased measure.

Second. Non-payment of "Public Benefits" judgments. The net amount of this deficiency is in the neighborhood of one million dollars, but all "Public Benefits" assessments since 1897 are taken care of annually by items in the regular appropriation ordinance.

Third. Errors in the administration of the funds collected, in the method of the collection of interest, in the failure to keep separate accounts with each assessment fund, and in the failure to collect valid special assessments and to institute new proceedings for the collection of those defeated. These evils are almost, if not entirely, eliminated as to current assessments, but present an enormous aggregate accumulation of defaults for which provision must be made.

The result of these evils is too plain to need any detailed description; all of which fall in the end on the property owner. He must pay in the end, heavy costs of litigation, while the resulting low market value of improvement bonds is discounted by the contractor, who to protect himself from loss on such bonds increases materially his bids for assessment work. The property owner, and the city also to the extent of its public benefit assessment, must accordingly pay hundreds of thousands of dollars annually in the increased cost of construction.

To cure and to prevent these evils I recommend:

First. That \$250,000 be appropriated from the revenues of the city, received from sources other than general taxation, for the formation of a special fund to be used for the prevention of defaults in payment of special assessment bonds, vouchers and rebates, pending delays in the collection of the corresponding special assessments, this money to be used, at

the discretion of the Board of Local Improvements, for the purchase of special assessment bonds and vouchers when the corresponding special assessment fund has been exhausted and a deficiency exists on account of delays in collection of the assessment for any of the causes above outlined; said bonds and vouchers so purchased by the city to be paid when and as the delinquent assessment is collected, the moneys so paid to be replaced to the credit of said fund.

Second. That \$207,000 be appropriated for the payment of "Public Benefits" judgments heretofore confirmed against the city, and not heretofore paid or appropriated for, to be used in the payment of the whole or any part of such of said "Public Benefits" judgments as the Board of Local Improvements may deem of the most importance to be paid. This appropriation to be in addition to the appropriation to be made for the payment of "Public Benefits" judgments rendered since 1897 coming due December 31st, 1902. The appropriation of a like sum annually for five or six years would result in the payment of the city's liability on old "Public Benefits" judgments and would in itself almost eliminate the city's liabilities in regard to special assessment matters.

Third. That \$50,000 be appropriated to be used in the payment of the liabilities of the city to the various special assessment funds where in the past the city has made an erroneous distribution or application of moneys collected by special assessments and has expended special assessment funds for purposes which should have been paid for by general taxation, or where the expense of levying and collecting supplemental assessments is greater than the amount which could be thus collected or where such supplemental proceedings would be inoperative because of the statute of limitations or for other insuperable legal objections, and where property has been stricken off to the city at the annual tax sale for lack of bidders.

Fourth. That the remaining net amount due from the city on account of "Public Benefits" judgments be refunded by the issue of twenty-year four per cent bonds, to be sold by the Comptroller from time to time, as necessary, in his

discretion, for the payment of "Public Benefits", so as to enable the prompt payment of the city's share of all past due bonds, vouchers and rebates in the so-called "old law" special assessment warrants.

In order to obtain full value for the above bonds steps should be taken before they are sold to test their validity in the Supreme Court.

I believe that the measures above suggested will bring special assessment bonds to par, and keep them there, will result in saving from ten to twenty per cent. in the cost of special assessment work, and will enable the payment of all old special assessment bonds, vouchers and rebates, strengthen the financial credit of the city, increase the market price of the general bonds and remove the long standing scandal of defaults bequeathed to us from the past.

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

JANUARY 10, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Your letter of January 6th, 1903, inquiring of the Corporation Counsel whether or not certain brewing companies have the right to draw water from the lake through their own pipes, and thus avoid purchasing water from the city, is received.

The water in the lake is not the property of the city and the city has no exclusive right to its use. An individual or corporation may take and appropriate it for use or consumption without violating any property right of the city. It would be unlawful to take the water from the pipes of the city, nor could pipes be laid in the streets for conveying the water from the lake without the consent of the city. But brewing companies are not obliged to purchase their water from the city. The water as it lies in the lake is free to all

alike, and the simple drawing on it for private use violates no law and infringes no rights.

Yours respectfully,

EDWIN WHITE MOORE,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JANUARY 12, 1903.

JOSEPH BADENOCH, Esq.,

Chairman Railroad Committee of the City Council.

Dear Sir:

I beg leave to submit in reply to your request for an opinion from this department "as to the powers and rights of the Railroad Committee in its investigation of the shortage of coal in this city, on the following points:

"*First.* In compelling the railroads to give prompt transportation and distribution of coal from the time it was received at the mines until delivered at its destination."

That in regard to this first point it may be stated as a general proposition that neither your committee nor the Council has the power to regulate the handling of coal by the railroads as suggested by you, unless it is found upon investigation that the railroad companies or some of their officials are guilty of being a party to a conspiracy or some other device or arrangement whereby some action on their part will serve to enhance the price of the commodity on the Chicago markets.

Neither your committee nor the Council has the power to compel railroad companies to give any more prompt service in the direction indicated than they can in good faith show their facilities or the necessity for carrying other freight will allow.

"*Second.* As to your powers "in preventing undue manipulation of stocks by dealers and exorbitant prices charged by them":

In regard to this proposition I will state that the fifty-first clause of Article V., of Chapter 24, Revised Statutes of Illinois, under the "POWERS OF COUNCIL", provides that "The

City Council in cities . . . shall have the power to prevent and punish forestalling and regrating."

In *Barton v. Morris*, 10 Phila. (Pa.), 361, the Court said:

"By the common law, the buying or contracting for any merchandise or victual coming on the way to market, or dissuading persons from bringing their goods or provisions there, as making the market dearer to the fair trader, was called 'Forestalling,' and rendered the perpetrators liable to fine and imprisonment. So also the offense of 'Regrating' was described by the State 5 and 6, Edward I., c. 14, to be 'the buying of corn or other dead victual, in any market, and selling it again in the same market, or within four miles of the place.' For this, it was held, enhances the price of the provisions, as every successive seller must have a successive profit."

Blackstone (4 Com. 138) says:

"Every device, practice or conspiracy, by act, words, or news, to enhance the market price of merchandise, is a forestalling of the market."

Under an English statute, 5 and 6, Edward VI., c. 14, "Forestalling the Market" was defined to be:

"The buying or contracting for any merchandise or victual coming on the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there; any of which practice make the market dearer to the fair trader."

This statute was repealed by Statute 7 and 8, Vict., c. 24 (1844).

As provided by the section of the Illinois statute above quoted, the City Council of Chicago has the power to pass an ordinance to prevent and punish forestalling. In accordance therewith, and for the purpose of providing against future contingencies, I submit herewith for your consideration an ordinance to prevent and punish forestalling.

Third. In reply to your request asking for suggestions along certain lines to aid you in your investigation, I have to say that as to what is a reasonable price for coal under present conditions this department has no means of furnishing any figures.

A reasonable price for coal per ton should be the cost of mining plus the cost of transportation, hauling, loading and unloading, and a reasonable margin of profit for the operator and dealer.

It has been stated that the railroad companies are anxious to get their cars unloaded and back in service, but that they have no control over their coal cars, and that they are under contract or lease to the large dealers, who are purposely holding them out in the yards and environments of the city, paying one dollar per day demurrage for periods of thirty days at a time.

This you will note would be thirty dollars per car. As the average car holds about thirty tons, each ton would thus cost them about one dollar per ton more, and by creating this scarcity in this manner they would be enabled, by reason of the increased demand, to raise the price two dollars to three dollars per ton, thus netting them a large profit.

It is also stated that more twenty-five to thirty ton cars are run in and unloaded than the larger cars, holding forty to sixty tons; that the reason the large cars are kept out in the yards and the smaller ones brought in is two-fold: First, that it satisfies the public that cars are coming in, but does not relieve the scarcity to the extent that larger cars would; second, that the large cars only cost one dollar per car demurrage also, and holding as they do from forty to sixty tons, the demurrage of thirty dollars per month only costs fifty to sixty cents per ton, and the profit is just so much greater.

Fourth. I suggest that your committee in its investigation ascertain:

Whether the railroad companies have control of their own cars, or whether they are leased or contracted for and by and to whom;

What the average demurrage charge has been for the past sixty days, to what road or roads it has been paid, and who the dealers are who have been paying it;

Also ascertain whether larger or small cars are first brought in and unloaded.

As your committee knows, the rights and powers granted

the Council are limited, the broad power of regulation and punishment in matters of this kind of course residing in the State. Possibly these suggestions, if followed out, may tend to aid you in your share of the work or at any rate be of some service to you in your efforts to assist the State.

Yours respectfully,

DAVID R. LEVY,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JANUARY 13, 1903.

CHARLES H. WERNO, Esq.,

Chairman of the Judiciary Committee of the City Council.

Dear Sir:

On the 8th ult., the City Council passed two orders relating to the regulation of hotels, one of which directed the Corporation Counsel to "prepare and submit to the Chairman of the Judiciary Committee a draft of an ordinance licensing and regulating hotels"; and the other directed the Corporation Counsel to prepare and submit to the City Council "an opinion concerning the authority of the city to license hotels, and, if, in his opinion, the city has such authority, to submit an ordinance providing for the issuance of such licenses." (See Council proceedings December 8th, 1902, pp. 1547 and 1549.)

Replying to both of these orders which, when considered together, raise the question whether the city has the authority to regulate and license hotels, I beg to state that I am of the opinion that the City Council possesses such power.

Under the Cities and Villages Act, neither the power to regulate nor to license hotels is specifically granted to a municipality. And neither of these powers can be derived by implication from any of the special provisions conferring authority on municipalities to regulate or license other occupations and things. But as the regulation and licensing of hotels comes within the scope of the police powers of a municipality (*Bostick v. State*, 47 Ark. 126, 130; *Tiedeman's Lim. of Police*

Powers, p. 227, Sec. 92), I think that the power in question may be derived from the general grants contained in paragraphs 66 and 78 of the Cities and Villages Act, which have been held to authorize the enactment of all necessary police ordinance.

“The common law of England and this country has for centuries justified this power of control (legislative) over common carriers and innkeepers.”

Tiedeman on Lim. Police Powers, p. 227, Sec. 92.

And many of the States have passed statutes licensing and regulating hotels and inns.

The reason of the rule rests upon the principle that the business of innkeepers and hotelkeepers, like that of common carriers, expressmen, hackmen, wharfingers, etc., is clothed with a public interest and affects the community at large, and is therefore subject to public regulation.

Munn v. Illinois, 94 U. S., 113.

The State statutes “supervising lodging houses, hotels, etc.,” (Hurd’s Rev. Stat. 1901, p. 1673), do not provide for exclusive control thereof by the State; and as such legislation comes within the police power, I think the City Council could exercise concurrent authority with the State, provided the municipal ordinance enacted would not be conflicting or inconsistent with the statutory provisions.

City of Spring Valley v. Spring Valley Coal Company, 71 Ill. App., 432.

Siebold v. People, 86 Ill., 33.

In view of the decision of *Bailey v. The People*, 190 Ill., 28, 35, construing Section 16 of the Board of Health Act, 1899, in regard to lodging houses, the proposed ordinance should not be discriminative, but should be directed against all persons engaged in business of the same general character, such as innkeepers, tavern-keepers, lodging house-keepers, and hotelkeepers.

If it is the wish of your committee that this office prepare the ordinance in question, I would suggest that the committee

indicate the character of the regulation desired, and an ordinance in accordance therewith will be drafted.

Very truly yours,

FRANK JOHNSTON JR.,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JANUARY 16, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

In your letter of the 10th inst., you propound the following inquiry:

“Where bonds are not paid at maturity, and there is subsequently sufficient money in the special assessment warrant to pay the interest for the deferred period, are we authorized or obliged to pay interest for such deferred period?”

In answer to this question I refer to the following provisions of the Special Assessment Act:

“Section 86. For the purpose of anticipating the collection of the second and succeeding installments, . . . it shall be lawful for such city, village or town to issue bonds, . . . bearing interest at the rate of five per centum per annum, payable annually. . . . Such bonds may be in the following form:

IMPROVEMENT BOND

“The (here should be inserted the name of the municipality), for value received, promises to pay to the bearer on the ——— day of ———, A. D. ———, the sum of ——— dollars, with interest thereon from date hereof, at the rate of five per centum, payable annually on presentation of the coupons hereto annexed.

“Which said bond may have coupons attached to represent the interest to accrue thereon.”

Section 42 of the Act of 1899 provides that the deferred installments of a special assessment shall bear interest from the date of confirmation until payment. Section 86 above quoted also contains the following clause:

“In case from any cause the installment against which such bond or voucher is drawn has not sufficient money to the credit thereof to pay the same, the entire amount of the assessment or any installment thereof may be applied toward the payment of any such voucher or bonds issued against the assessment.”

The purpose and spirit of these sections, construed in the light of the entire Special Assessment Act, is to authorize the property owner to pay his assessment in installments, with interest on the deferred installments until payment, and to issue interest bearing bonds for the purpose of anticipating the collection of the assessment, payable out of the same when and as received. As stated in a former opinion, these bonds are primarily payable out of the special assessment against which they are drawn, and each installment constitutes a separate trust fund for the payment of the bonds and vouchers issued against such installments, but this trust, when all liabilities against the installment are paid or ascertained and provided for, yields to the superior trust which charges the whole assessment with the payment of all the liabilities legally incurred for the cost of the entire improvement.

I therefore am of the opinion that if by reason of the non-payment of an assessment at maturity, default or delay is made in the payment of bonds, said bonds continue to bear interest during such default, and when the assessment fund is replenished by the collection of the assessment and interest, so that there remains in the particular installment or in any other installment where there is a surplus above defined, sufficient money to pay the interest for such deferred period, it is the duty of the Comptroller to use the money thus coming to his hands in said fund for the payment of interest of the bond after its maturity and during its default and until the date of payment of the bond.

It has come to my notice since January 2d that there are instances in which interest coupons have been defaulted by non-payment where there is a deficiency in the installment against which said bond is drawn, but where there is a bal-

ance to the credit of a prior installment over and above all liabilities against the same.

In such case the surplus in the prior installments over and above all liabilities issued against such installments will be transferred to the subsequent installment and used for the payment of the liabilities against the same.

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

JANUARY 19, 1903.

MR. FRANK T. FOWLER, Alderman Fourteenth Ward.

Dear Sir:

I beg leave to acknowledge the receipt at your hands of a copy of an order of the City Council of June 2d, 1902, wherein it is stated that West Water street, from Madison street north to Kinzie street, is almost entirely occupied by private interests to the exclusion of public traffic; wherefore the Committee on Streets and Alleys West was ordered "to take up the matter at once and either provide an elevated roadway or adequate compensation to the city for that portion of the street so occupied," with your verbal request for an opinion of this office as to the rights and powers of the city in procuring, or compelling from the railroad companies proper use of this street for the public.

I am informed by you that the street is so occupied by railroad tracks as practically to exclude the public from the use thereof.

An ordinance passed August 16, 1858, provides that:

"Permission is hereby granted to the Pittsburg, Fort Wayne & Chicago and the Chicago, St. Paul and Fond du Lac Railroad Companies, and all other railroad companies that may unite with them, to lay down, construct, maintain and operate a single or double railroad track with all the necessary switches, sidetracks, turnouts and turntables" on West Water street. It is further provided in Section 4 of this ordinance:

“Said companies may associate with themselves in the construction and use of such tracks, any and all railroad corporations; and any corporations so associated shall possess all the powers herein granted to the said Pittsburg, Fort Wayne & Chicago and the Chicago, St. Paul & Fond du Lac Railroad Companies, and said latter companies shall allow and permit the use of the tracks constructed under this ordinance by any other railroad corporations upon such terms and conditions as shall be fair and equitable.”

It is also provided in Section 2:

“Said companies shall improve and maintain the public highways so used by them as may from time to time be ordered by the Common Council.”

The railroad companies . . . are obliged to leave space enough for public travel. They cannot maintain that the whole of the street is “necessary” for switches, side-tracks, etc. The necessities of the public and the rights of the public are paramount to the necessities of the railroad companies. The city has the right to compel the railroad companies to remove so much of the tracks as are necessary to leave a sufficient passageway for ordinary traffic, and to put this passageway in such condition of repair as the Council may require.

The city should define a certain space of such width and in such part of the street as it deems proper for public use, and notify the railroad companies to remove their tracks from the portion of the street designated. If the companies refuse to remove them, the city may do so.

Yours respectfully,

EDWIN WHITE MOORE,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JANUARY 19, 1903.

MR. JOSEPH BADENOCH,

Chairman Committee on Railroads of the City Council.

Dear Sir:

I have your letter of the 14th inst. stating that your committee has presented to the City Council an ordinance providing for the appropriation of \$25,000 for the relief of the poor who may be without coal; that this ordinance has been by some members of the committee considered legal on the ground that there is an emergency threatening the health of the citizens, and that the money may therefore be legally appropriated for the use of the Health Department; and requesting the opinion of this department on the legality of the ordinance.

The ordinance is printed at page 1814 of the current Council proceedings and reads as follows:

“Whereas, An emergency now exists in the City of Chicago which threatens the health and lives of the citizens of this city, owing to the scarcity of coal; and

“Whereas, It is desirable to provide against the dangers and hardships resulting from such emergency; therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF
CHICAGO:

“SECTION 1. That the sum of twenty-five thousand dollars (\$25,000) be and the same is hereby appropriated out of ‘miscellaneous receipts’ of the City of Chicago not otherwise appropriated, to be expended by the Department of Health in meeting said emergency.

“SECTION 2. This ordinance shall be in force and effect from and after its passage.”

If the emergency referred to in your letter is so general in its nature that a condition exists whereby, as recited in the proposed ordinance, on account of such scarcity of coal, the health of the community is imperiled, then under the power conferred by the charter “to do all acts and make all regulations which may be necessary or expedient for the promotion of health or suppression of disease” the City Council may take such measures as in the circumstances may be actually necessary.

I wish to add that while the City Council has a right to declare what is a nuisance, it has no right to declare that thing to be a nuisance which is not one in fact. So here the City Council may not declare that condition of affairs to be an emergency affecting the general health which is not such in fact.

While I have stated above the power of the City Council in this regard, I think it proper to inform you that the actual duty of providing for the poor is placed by the statute upon the county, and not upon the city.

Yours respectfully,

CHARLES M. WALKER,

Corporation Counsel.

JANUARY 26, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At the last meeting of your honorable body, it adopted a resolution directing:

"That the Corporation Counsel submit to this Council, at its next regular meeting, an opinion as to whether or not the municipality of Chicago, under its present charter, has the power to open municipal coal yards;" . . . and if "it is found possible for the city to enter into business of this nature, that the Corporation Counsel prepare and submit to this Council an ordinance for the establishment of three (3) central municipal coal yards . . . looking to providing coal on the wholesale plan only."

I infer that the question is whether the City of Chicago, under its charter, has the power to engage in the business of buying and selling coal. The Supreme Court of this State has held that a municipal corporation can exercise the following powers:

First. Those granted in express words;

Second. Those necessarily or fairly implied in or incident to the powers expressly granted;

Third. Those essential to the declared objects and pur-

poses of the corporation—not simply convenient, but indispensable.

Huesing v. City of Rock Island, 128 Ill., 472-3;

Cook County v. McCrea, 93 Ill., 236.

The charter confers no express power upon the City of Chicago to establish or maintain coal yards, nor do I think that such power can be said to be “essential to the declared objects and purposes of the corporation.” Therefore, if the power exists, it must be implied in or incident to some of the powers expressly granted by the statute.

Clause 54 of the powers under the charter grants the municipality the right “to regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay and any article of merchandise.”

This is a specific grant, authorizing legislation to a certain extent concerning coal business.

The remaining grants from which the city might derive the power in question, would be the so-called “general welfare” clauses of the charter. But since said Clause 54, in pursuit of a purpose similar with that contemplated by said general welfare clauses, namely, the welfare of the community, confers upon municipalities a specific power of legislation as to coal business, they are therefore limited to the terms prescribed by this special power, and cannot derive enlarged powers from the said general grants authorizing legislation on the same subject.

Huesing v. City of Rock Island, *supra*, 128 Ill., 465.

I am therefore of the opinion that the city has not the power under its charter to engage in the business of buying and selling coal.

Respectfully yours,

CHARLES M. WALKER,

Corporation Counsel.

JANUARY 29, 1903.

FRANCIS O'NEILL, Superintendent of Police.

Dear Sir:

I have your letter of recent date enclosing a communication to you from Inspector Hunt, suggesting that the attached

report of Lieutenant Backus, of the Eleventh Precinct, be referred to this department for our opinion as to whether F. L. Kelsch, who conducts a billiard hall and bowling alley at 889 and 891 E. 51st street is violating the liquor laws.

Lieutenant Backus reports "that when beer is wanted by any of the players the porter goes across the street to a saloon and buys it and brings it to the above number where it is drank. It does not appear that Mr. Kelsch derives any profit from the transaction. This place was run as a saloon until June of this year when it was refused a license because of a protest."

Section 1182 of the Revised Code of Chicago of 1897 is:

"Any person who shall hereafter have or keep any saloon, tavern, grocery, ordinary, victualing *or other house or place* within the City of Chicago for selling, *giving away, or in any manner dealing* in intoxicating liquors in quantities less than one gallon or who by himself, his agents or servants shall sell, *give away, or in any manner deal* in intoxicating liquors in quantities less than one gallon, or who by himself, his agents, or servants, shall keep a dram shop for the sale of liquors in quantities less than one gallon without a license therefor, in pursuance of this chapter, and other ordinances of the City of Chicago, shall, upon conviction, be fined not less than twenty dollars nor more than one hundred dollars for each and every offense."

The fact that Mr. Kelsch derives no profit from the supply of beer to his patrons of the billiard and bowling games does not take the case out of the section of the ordinance quoted.

In the case of *State v. Layman*, 5 Harr. (Del.) 510, the defendant who was indicted for keeping a gambling house kept an oyster house, and allowed persons to play cards for money. *He had no direct interest in the sums staked.*

It was contended that he *derived no profit* from the gambling.

This contention was denied by the judge, who charged the jury that:

"The offense was the causing and procuring many per-

sons to resort to such a house, for the purpose of gaming, and for the defendant's profit, *either directly* upon the game itself, or the *incidental sale of oysters or other things.*"

In the case of *State v. Leighton*, 23 N. H. 167, the defendants were indicted for unlawfully keeping a gaming place for "money, hire, gain, and reward." The facts showed that it was contrary to the rules of the room to game for money, but that it was the general custom, for the party defeated in the game to *defray the expenses* of the tables. The court held (page 170) that the defendants were keeping a gambling house for "hire" and that they "made a *profit* from the use of the billiard tables."

In this case there is but one inference to be drawn from the facts and that is that Kelsch is deriving a "profit" from the serving of beer in connection with his business of billiards and bowling alleys, although he himself may not "charge" for the service of the porter in going across the street to a saloon and buying it for the players in Kelsch's place and bringing it to them where it is drunk.

The method pursued by Kelsch is in itself, without considering the question of "profit" a violation of said Section 1182. This section makes it unlawful to sell, give away or in any manner deal in intoxicating liquors in quantities of less than one gallon, without a license so to do.

Section 2 of Chapter 43, Hurd's Revised Statutes, reads:

"Whoever, not having a license to keep a dram shop, shall, by himself or another, either as principal, clerk or servant, *directly* or *indirectly*, sell any intoxicating liquor in any less quantity than one gallon to be drank upon the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined. . . ."

The fact that Kelsch had formerly conducted a saloon at the same place under a license, and that the license had been taken away from him strengthens the case against him.

In my opinion Mr. Kelsch is violating the State Dram Shop Law and the City Liquor Ordinance in supplying, with-

out a license so to do, drinks to his patrons in the manner described in the report of Lieutenant Backus.

Very truly yours,

WILLIAM H. SEXTON,
Assistant Corporation Counsel.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

JANUARY 29, 1903.

MR. F. X. BRANDECKER, City Collector.

Dear Sir:

Answering your letter of January 14, 1903, addressed to the Corporation Counsel, inquiring as to the method which should be pursued in the collection of special assessments levied on the installment plan, under the present special assessment law, and adopting in this opinion the order employed by you in the collections contained in your letter, I beg leave to say:

First. When the owner of property desires to pay the first installment before its maturity, you cannot then insist upon the payment of any interest. The interest on the second and succeeding installments of the assessment becomes due with the first installment on January 2d next succeeding the final acceptance of the work. You should, therefore, advise the property owner, who desires to pay his first installment in advance of maturity, that interest on the other installments will be due on the succeeding January 2d, and that his property is liable to sale on account of non-payment of said interest at maturity. It is to be presumed that the property owner who desires to pay his first installment in advance will also be willing to pay, in advance, the interest which becomes due with the first installment.

I am further of the opinion that the property owner who pays the first installment in advance before maturity has no right to insist upon the acceptance by the city of interest on the installments to the date of such advanced payment of the first installment, for the reason that interest under consideration is not interest on the first installment, but on other

installments, and it is only when the property owner pays the second or some subsequent installment, in advance of its maturity, that he is entitled to have the interest computed upon the installment thus paid in advance to the date of payment.

Each installment, except the first, bears interest, and this interest can only be terminated by the payment of the installment.

Second. If the first installment of an assessment is paid after the second day of January and before the tenth day of March, next succeeding the completion and acceptance of the work, as a proposition of law you might collect interest on the subsequent installments either to the second day of January last preceding or to the date of payment, but for the purpose of greatly simplifying the keeping of books and records, I am of the opinion that the preferable system from a practical standpoint, and one that is entirely legal and in harmony with the spirit and purposes of the special assessment act, is to then collect interest on the second and all subsequent assessments to the second day of January last preceding.

Third. Even if all matured installments have been paid, yet if interest due on January 2d of any year remains unpaid at the time of your return of delinquent assessments to the County Collector, you should return to him such delinquent interest; but you should not return interest on that interest from January 2d to April 1st. The law does not provide that overdue interest on an assessment shall bear interest. That part of Section 65 of the Local Improvements Act, applicable to this question, reads as follows:

“It shall be the duty of the collector on or before the first day of April in each year to make a report in writing of all the land, town lots and real property on which he shall be unable to collect special assessments or interest due to the preceding January 2d on installments not yet matured.

Fourth. Your fourth question is not perfectly clear, but I understand it to be an inquiry as to whether or not the same rules of collection shall apply in a special assessment levied in installments which was levied and confirmed

under the law of 1897, and to those which were levied and confirmed under the law, as amended in 1899. So far as this question relates to the method of computing interest, the time at which the installments and interests become due, and the method of the return of delinquent installments and interest, I answer this question in the affirmative. There is no vested right in mere matters of form or procedure. The amendments of 1899 do not affect any substantive question of right, but matters of procedure only, and in such case "all rights of action will be enforceable under the new procedure without regard to whether they accrued before or after such change in the law." (*Chicago & Western Indiana Railroad Company v. Guthrie*, 192 Ill. 579.)

Fifth. Under the law of 1897 (Section 42) and the amendment of 1899 it was provided that after the bonds have been issued in a special assessment case payment should not be received from any installment before its maturity, unless interest thereon up to the second day of January of the succeeding year was also paid at the same time.

There has been an attempt to amend this section by the amendment of 1901, but, as already stated in an opinion from this department, Section 42 of 1901 is inoperative. (*L. & N. R. R. Co. v. East St. Louis*, 134 Ill. 656. The amendment under consideration attempted to make four changes in the law:

(1) To authorize the division of all assessments into installments not more than ten in number.

(2) To fix the rate of interest at five (5) per cent. per annum.

(3) To provide that interest shall begin to run from date of the first voucher instead of from the date of confirmation.

(4) To provide that when installments were paid before maturity, interest might be paid to date of payment instead of to the second of January succeeding.

As a matter of policy the Board of Local Improvements has undertaken, administratively, to give the property owners the benefit of the attempted reform of the law, by computing interest from the date of the first voucher. It has been stated

already in an opinion from this department that this might be done for the reason that, as an administrative measure, it resulted to the benefit of the property owner, without injuring the contractor or bondholder.

In suit brought in the Circuit Court, in 1899, Judge Richard S. Tuthill held that the provision of the law of 1897 is invalid and he enjoined the collection of interest in advance. This injunction was never appealed from and is therefore still of binding force. You will therefore compute interest on advanced payments to the date of payment. In all such cases you should promptly notify the comptroller of such advance payments so that steps may be taken for the prompt calling of bonds for payment, in advance of maturity, in order that no deficit may be caused in the assessment fund by the stopping of interest on the assessment while interest continues to run on the improvement bonds.

Sixth. Interest on second and subsequent installments of assessments that were levied prior to the enactment of the law of 1897 should be returned in like manner to that fixed by law, for the return of interest on assessment levied and confirmed under the present law.

Very respectfully,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

FEBRUARY 28, 1903.

MR. CLAYTON MARK, President Board of Education.

Dear Sir:

In answer to your request for an opinion as to the legality of the payment by the Board of Education of certain special assessments levied against school property, I beg leave to say this opinion is based upon the following facts:

First. During the year 1901 special assessments were confirmed in the County Court against school property other than that derived from the General Government, situated in Section 16, being property acquired by condemnation or pur-

chase, and paid for by moneys derived from school taxes levied on property situated in this county. The amount of these special assessments is about \$50,000 and they became payable on January 2, 1902.

Second. To provide for the payment of these assessments the Finance Committee inserted an item in the appropriation ordinance of 1902 of fifty thousand dollars, which was included in the appropriation for "Building Purposes."

Third. Your then president and attorney expressed their doubts as to the legality of this item and their fears that it would on the objection of some property owner be declared illegal by the County Court at the hearing of objections to the application for judgment of sale for delinquent taxes in July of that year; but promised to use this money for the payment of said special assessment if and when it was collected and received by your Board.

Fourth. No objection was raised to the legality of this item of the school tax at said July term of said court, nor has the item been declared illegal by any court, but the tax has been collected and is now held by the City Treasurer for your use and is subject to the disposition of your Board.

Fifth. Practically the same situation exists as to the special assessments against school property confirmed in 1900, payable in 1901 and appropriated for in 1901.

Sixth. None of these assessments has been paid and as a result, improvement bonds of the City of Chicago, issued in payment for the respective improvements, and payable only out of the respective special assessment funds, have necessarily been defaulted in payment, both as to principal and interest.

This statement of facts presents two questions:

First. Is it lawful to levy special assessments against that school property not derived from the general government through the State and situated in Section 16; that is to say, special assessments on property purchased with the proceeds of school taxes levied upon lands in this county, the title of which property is in the city for the use of schools? This department has already delivered an opinion to the Board of Local Improvements, under date of December 2, 1901, answering this question in the affirmative. A copy of said opinion

is hereto attached. In addition to what is said in the opinion referred to, I beg leave to call your attention to the case of *Brennan v. The People*, 176 Ill. 620 (624, 630), in which the theory that the Board of Education is a State agency, separate and distinct from the city government, is denied, and it is held that said Board is "connected with, dependent upon, and to some extent a part of, the municipal government" of the City of Chicago. This case was not cited in the opinion above referred to, but is entirely harmonious with the contention that school lands not situated in Section 16 are not State property, but are city property and are therefore subject to special assessment under the principles of the cases cited in said opinion.

Second. The next question presented by the facts above stated is whether or not special assessments are properly included in the appropriation for building purposes. The theory of special assessments is that they represent the amount of the increase in the actual cash market value of the land resulting from construction of the proposed improvement. The improvement must be of a permanent nature, and a special assessment cannot be maintained for repairs or mere temporary improvements. The judgment of confirmation of a special assessment, therefore, is conclusive that the school property has been actually increased in market value by reason of the construction of the improvement involved in the assessment proceeding, and that said improvement is of a permanent nature. I believe that no sound distinction can be drawn between the improvement of the property by constructing a building upon it and the improvement of the same property by the construction of a permanent street pavement contiguous and appurtenant thereto. Each of them is a permanent improvement which raises the cash market value of the land.

The question of whether or not an appropriation for the payment of special assessments on school lands other than lands in Section 16, is properly included in the appropriation for "Building Purposes", has been decided both ways by the courts of this county, but has not yet been passed by our Supreme Court. The question is therefore at best

an open one, as far as precedent is concerned, and I believe that the logic of the cases justifies an affirmative answer also to the question involving the validity of the inclusion of special assessments in the appropriation for building purposes.

The sums of money above referred to were appropriated with the intention on the part of the Finance Committee, the City Council and the Board of Education that they should be devoted to the payment of the said assessments, and this money is impressed with a trust in favor of said special assessment funds. No tax-payer has raised any question with regard to the legality of the tax, but said taxes have been voluntarily paid in full. I am therefore of the opinion that both of these sums of money, one hundred thousand dollars, should be devoted to the payment of the special assessments referred to above.

Very respectfully yours,
EDGAR B. TOLMAN,
Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

MARCH 6, 1903.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your letter of March 3, 1903, addressed to the Corporation Counsel, with enclosure of February 28th from C. C. Coffin, Agent South Shore Drive Commission, both of which have been referred to me, I beg leave to state that no proceedings can, in my opinion, be maintained by the city for the condemnation of the private property in Groveland and Woodland Parks until the Legislature has granted the necessary rights for the establishment of a street or driveway through the public portions of said parks and the Douglas Monument grounds. Until these grants are made by the State, the condemnation proceedings would be for the opening of a street which would not be a thoroughfare until and unless further legislation was obtained from the State of Illinois. This case comes directly under the principle an-

nounced by our Supreme Court in the case of *Hutt v. City of Chicago*, 132 Ill., page 352.

It should perhaps be noted that the ordinance of May 13, 1901, referred to in Mr. Coffin's letter, contains the following section:

"Sec. 8. Unless said Board of South Park Commissioners shall, within one year from the approval hereof, take and accept the said avenues, streets and alleys as an entirety, each and every one, in manner and form as by law provided, and upon the terms and conditions aforesaid, then this ordinance is to be of no force or effect, and the consent hereby given shall be withdrawn."

This department has not been advised whether or not such acceptance has been had, and the original term for the acceptance thereof, which has now long since expired, has been extended by the Council.

Yours very truly,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

MARCH 12, 1903.

HON. L. E. MCGANN, City Comptroller.

Dear Sir:

Answering your letter of recent date, forwarding letter of inquiry from Mr. J. M. Holmes, with regard to local improvement bonds, I beg leave to say that mere technical objections to a special assessment proceeding and objections going merely to the amount of the assessment can only be heard on the application for the confirmation thereof, and after the confirmation of the assessment and the time for appeal and writ of error has gone by, objection can only be heard to the application of the County Treasurer for judgment of sale for the delinquent special assessment. It is now the settled law of this State that at this hearing no collateral attack can be made upon the original judgment of confirmation; that only questions of jurisdiction, of the total voidness of the original judgment and of those other grounds which would be the foundation for an injunction in equity can then be heard.

Since no special assessment bonds are issued until the judgment has been confirmed, it must be apparent that the defenses which can be raised after the bonds are issued are extremely narrow. The courts have also decided that when a special assessment has been levied, if the same is set aside on appeal or writ of error for some technical defect, not making the ordinance absolutely void, the city can and must maintain a new special assessment proceeding, and that a new assessment will be spread in lieu of the one thus found to be defective. The statute also provides that the payment of the first installment shall be a waiver of all defects in the proceedings, and that no defense can be made to an application for judgment upon a second or subsequent installment which might have been made to the first. About the only defect which can be heard at application for judgment is a total misdescription of the land or that enough money has been already paid by the objector to furnish a fund sufficient for the payment of the bonds and warrants, and that the balance of the assessment is not needed for this purpose, or that the improvement constructed is so essentially different from the one described in the ordinance that it constitutes a wholly different improvement.

Mere defects in the material or workmanship used in the improvement constitute no defense. (*People v. Whidden*, 191 Ill. 374.)

Under the provisions of the new law, which provides that the funds of each assessment and of each installment thereof shall be kept in a special account, and that the funds for different improvements shall not be intermingled, one of the chief difficulties under the old law has been removed.

I am of the opinion that special assessment bonds issued under the new law are safe investments. The provisions of the new law afford ample remedies for the enforcement of the entire amount of the assessment against which said bonds are issued, and the provision which has been made in the present appropriation bill for the creation of a fund to prevent defaults arising from appeals and tax sales, together with the administration of special assessments under the direction of the present Board of Local Improvements, gives promise of

every reasonable assurance not only that the bonds will be collected and ultimately paid, but that the defaults, which in the past arose through delays in the collection of the assessment, will be obviated and both interest and principal paid at maturity.

Very respectfully yours,
 EDGAR B. TOLMAN,
Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,
Corporation Counsel.

MARCH 19, 1903.

HON. L. E. MCGANN, City Comptroller.

Dear Sir:

Replying to your letter of even date, in re voucher Walter Fleming, being partial estimate issued against Warrant No. 31,058 for building sewers in North Fortieth avenue, from Milwaukee avenue to West Belmont avenue, I beg leave to say:

Section 89 of the Local Improvements Act provides:

"Any property owner may pay his assessment, wholly or in part, with the bonds or vouchers issued under this act on account of such assessment, applying, however, the bonds and vouchers of each series only to the payment of the installments to which they relate. In making such payments such vouchers and bonds shall be taken at their par value and interest accrued to the date of making such payment. All vouchers and bonds received in payment of such assessment shall be canceled by the officer receiving the same as of the date of their receipt, and deposited with the treasurer of the said town or village issuing the same."

This section, however, must of course be construed to mean that valid vouchers may be thus applied for the amount of the actual indebtedness from the city to the contractor represented by such voucher. Your letter states that this voucher has been assigned, and I learn that the assignment was prior to the filing of any lien notice against said special assessment fund, and the question is suggested whether or not the pres-

ent owner of the voucher is not an innocent purchaser for value, holding the same free from defenses which might be urged as between the city and Fleming, the original contractor. This question has very recently been decided by our Supreme Court in the negative. In the case of *National Bank of La Crosse v. Petterson*, 200 Ill. 215 (218), the court said:

"These bonds and vouchers were not negotiable and had no effect to invest the appellant with any right superior to that of the contractor to whom they were issued."

You are therefore to treat said voucher by whomsoever presented as though presented by Fleming, the original contractor, and you are at liberty to receive it from the assignee, one of the property owners assessed, only for the amount that is actually due thereon.

Subsequent to the assignment of the voucher aforesaid, lien notices for materials furnished have been filed with the Board of Local Improvements aggregating \$349.11 and labor claims aggregating \$114.77, making a total of \$463.88 liens against the amount which may be due from the city to Fleming. This office has no information as to the entire amount to which Fleming would have been entitled for the entire performance of his work, nor of the total amount of vouchers which have been issued. If no other voucher than the one in question has been issued, and there is a balance in the fund of \$463.88, or more, the Comptroller would be at liberty to hold said balance for the payment of the lien claims and honor the voucher. If, however, there is not a sufficient balance in the hands of the Comptroller for that purpose, in view of the opinion of the Supreme Court above referred to, the city can only be protected by holding out of the voucher a sum of money which, together with the balance in the fund, if any, shall be sufficient to cover the lien claims above stated.

Very respectfully yours,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

MARCH 19, 1903.

JOHN A. MAY, Esq.,

Secretary of Board of Local Improvements.

Dear Sir:

Referring to the letter of Mr. McGann of February 27th, regarding the voucher issued to Andrew Maloney for \$813.20 under Warrant No. 31,060 issued for the construction of the incompleated portion of the sewer in South Forty-third court, from the first alley south of Twenty-second street to the right of way of the Chicago, Burlington & Quincy Railroad:

As I understand this matter the original estimate was for thirteen hundred and seventy-five (1,375) feet at \$1.30 per foot, and of this amount eight hundred and twenty-five (825) feet was constructed by Mr. Fleming, and he was delivered vouchers for \$911.63, \$160.87 being held as a reserve; five hundred and thirty-five (535) feet was constructed by Andrew Maloney, for which has been issued a voucher for \$856, less five per cent. reserve, amounting to \$42.80.

It also appears that claims have been filed by laborers against Walter Fleming for work done on the above improvement, amounting to the sum of \$799.43.

I would respectfully call your attention to Section 24 of an act, entitled "An act to revise the law in relation to Mechanics' Lien," which provides as follows:

"Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor for a public improvement in this State, shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement: *Provided*, such person shall, before any payment or delivery thereof is made to such contractor, notify the officials of this State, county, township, city or municipality whose duty it is to pay such contractor of his claim by a written notice and the full particulars thereof. It shall be the duty of such official so notified to withhold a sufficient amount to pay such claim until it is admitted, or by law established, and thereupon to pay the amount thereof to such person, and such payment shall be a credit on the contract price to be paid to such contractor. Any officer violating the duty hereby imposed upon him shall be liable

on his official bond to the person serving such notice for the damages resulting from such violation, which may be recovered in an action at law in any court of competent jurisdiction. There shall be no preference between the persons serving such notice, but all shall be paid *pro rata* in proportion to the amount due under their respective contracts.”

The above amendment to the law in relation to mechanics’ liens was passed June 26, 1895, and before the passage of the said amendment there was no provision in our law providing for a mechanics’ lien on any public improvement. (*Smith v. Kennedy*, 89 Ill. 485.)

Therefore, I am of the opinion:

First. If no claims were filed with the City Comptroller before the issuance and delivery of the vouchers for \$911.63 to Walter Fleming, the said vouchers were rightfully delivered by the Comptroller. (*Young v. Jones*, 180 Ill. 216.)

Second. The claims of lien holders attach only to the amount which the city actually owes the original contractor at the time of service of the lien notices, and the first question to ascertain is whether or not the city was *actually* indebted to Fleming when the lien notices were filed; if so, the lien holders have a claim upon such real balance; if not, they have no such claim.

Third. The contract between Fleming and the city and the statute governing such cases gave the city the right to re-let the work if the original contractor failed to comply with his contract, and entitled the city to charge the original contractor with the actual cost of completing the work. The work in question was thus re-let, on due notice and advertisement, to Andrew Maloney for \$856, and he has complied with the terms of his contract. The city therefore has the right to charge this \$856 to Fleming’s account, from which it follows that there never was any balance really due Fleming to which mechanics’ liens could attach (*Mehrle v. Dunne*, 75 Ill. 239), unless their claims come in ahead of the rights of the holders of his vouchers already issued. The question is further discussed in paragraph five, *infra*.

Fourth. Andrew Maloney having complied with his contract for the construction of the remainder of the improve-

ment is entitled to payment of his contract price (in the manner hereafter stated), less the reserve named in his contract, and his rights are not affected by the fact that the city has issued to Fleming vouchers in excess of the amount which should have been delivered to him; that is to say, vouchers which at the time represented what was thought to be the correct amount, but which have since been found to be more than he should have received by reason of his failure to complete the work and the necessity of re-letting the same. On the other hand, he has, by his agreement, bound himself to look to the special assessment fund alone for the payment of his vouchers, and that the city shall in no respect be otherwise liable. Against this fund have already been issued a voucher for \$911.63 and the city is entitled to hold a reserve of \$160.87 and reserve vouchers so that the fund has already been reduced in the aggregate to \$1,072.50. The amount of the assessment fund is \$1,792.50, leaving only \$720 in the fund available at present for the payment of Maloney's contract. I am of the opinion that a voucher for \$720, less his reserve, should be issued to him at once, notwithstanding the filing of the lien notices.

Fifth. The question of how Maloney is to be paid the balance of his contract price presents serious difficulties. In my opinion it will not be possible to maintain a supplemental assessment for the collection of this excess of cost. Property owners are entitled to have work done for the amount of the original contract (*Young v. Jones, supra*, page 219). If at the end of the reserve period the city has no claim against the \$160.87 Fleming reserve aforesaid, that sum of money may be applied to the payment of Maloney's balance. Another solution of this question, however, may be found in the establishment of a defense against the original vouchers issued to Fleming. It has recently been held by the Supreme Court that special assessment bonds and vouchers are not susceptible of transfer by sale or assignment, so as to shut off defenses on the part of the municipality; in other words, that there can be no innocent holders of those bonds and vouchers, but that they are taken subject to all existing defenses. (*National Bank of La Crosse v. Petterson*, 200 Ill.

215 (218.) While the facts in that case were slightly different from the facts under consideration, in that the bonds and vouchers there referred to were issued after the service of the lien notice, still if the principles laid down by the court in that case are carried to their logical extent, the city will have a defense on the said Fleming vouchers to the extent at least of the balance due upon the Maloney contract and perhaps to the extent also of the amount due the persons who have thus filed lien notices. No adjudicated case has yet been decided which answers this latter question definitely but it is certainly the duty of the city to present this question for decision to some court before paying any money upon the Fleming vouchers.

To summarize: I have therefore reached the conclusion that Andrew Maloney should be given a voucher for the balance aforesaid, available in the fund, less his reserve, but the lien holders should be paid nothing at present; that the vouchers given to Fleming should not be paid without deducting the balance due Maloney, nor without a judicial determination whether or not the claims of the lien holders are superior to the payment of his vouchers.

I return herewith letter of the Comptroller, the Maloney voucher and two memoranda submitted to me with regard to the amounts of the liens and the cost of the work.

Very respectfully,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

APRIL 30, 1903.

HON. L. E. MCGANN, City Comptroller.

Dear Sir:

Your letter dated April 17th, addressed to the Corporation Counsel (your No. 606), enclosing also letter from the Barber Asphalt Company dated March 27th, requesting you in the case of partial payments upon improvement bonds to issue new bonds for the unpaid balance of even date with the

original, instead of endorsing payment upon the original bond, duly received.

You ask whether or not you may lawfully comply with said request.

In answer to said question, I beg leave to say, that a careful examination of the Local Improvements Act fails to disclose any legal objection to the plan proposed. If as stated in the enclosure above referred to, bonds upon which a partial payment is credited are unmerchantable, but bonds showing no such credits can be sold on the market, the adoption of such course seems not only fair, but materially advantageous to the contractor and the city. Any obstacles which are thrown in the way of realizing upon the improvement bonds as current securities, convertible into money at will by sale, must necessarily operate to increase the price of bids for local improvements, while any course adopted, which improves the status of the bonds with which the contractor is to be paid, enables him to bid more closely and encourages competition in such bidding.

The plan proposed is similar to the familiar plan adopted daily in business transactions of giving a new note for the balance due upon a former note after a partial payment has been made.

Of course, proper precautions should be taken not to disarrange the relation of the various series of bonds to the various installments of the assessment.

Very respectfully,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

APRIL 30, 1903.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Answering your letter of April 18, 1903, with regard to the payment of rebates in Warrant 23,925; and in reference

also to a general rule to be adopted in similar cases, I beg leave to say:

The facts in regard to Warrant 23,925 are as follows: It was a case arising under the law of 1897, prior to the amendments of 1901. At this time the law permitted a special assessment to be certified immediately after confirmation, whereas under the present law an assessment cannot be certified after the completion and acceptance of the improvement. The questions passed upon in the following opinion, therefore, apply only to cases governed by the law of 1897, and not to cases confirmed since the amendments of 1901.

In the case referred to, soon after the assessment roll had been certified to the City Collector and before the actual cost of the work had been determined, certain property owners paid the amount of the assessment in full; later on the cost of the assessment was ascertained and an abatement entered as to the assessment of all property owners who had not paid the assessment in full, and a rebate credit made as to those who had so paid the assessment in advance. The then Comptroller, however, declined to pay said rebates until the last installment of the assessment had been fully collected.

An examination of the state of accounts in this warrant discloses the fact that upon all installments which have already matured more than enough money has been collected to pay all liabilities against such installments, and that the installments of the assessment which have not yet matured are sufficient in amount to pay, if collected, all liabilities which will mature against said installments, including a safe margin for interest between the dates of payment of the assessment and of maturity of the bonds.

The law of 1897 contained in Section 84 the following clause:

“The intent and meaning hereof being that no property owner shall be required to pay to the collector a greater amount than his proportionate part of the contract price for said work and of the expense thereof and of the interest paid thereon, plus ten per centum for contingencies.”

In fact it has always been one of the fundamental prin-

ciples of the special assessment law that no property owner shall be called upon to pay more than the proportionate share of the cost of the improvement. To hold any portion of the money of one property owner, beyond his share of the cost of the improvement for the purpose of making good the possible defaults of another, is contrary to the spirit of the act, and in my opinion unlawful.

In the case under consideration and all similar cases I am of the opinion that the amount thus paid by the property owner, in advance of abatement orders, and in excess of the amount which the property owner ought to pay, should be refunded without delay, where said money still remains in the fund, and the assets of the fund are sufficient to cover its liabilities, including similar rebate liabilities.

Very respectfully,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

Approved:

CHARLES M. WALKER,

Corporation Counsel.

MAY 1, 1903.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Answering your letter of April 28th, requesting me to vacate judgments and dismiss petition in Docket No. 27,464, paving West Eighteenth street, from Canal street to Halsted street, and your letter of March 23, 1903, in the same manner, requesting me to furnish you with an opinion as to whether or not the fact that the term of court at which the judgment of confirmation was entered has passed makes it inadvisable to vacate the judgment and dismiss the proceedings, I beg leave to say:

First. The Council Proceedings (page 2741) do not show that the repeal of this ordinance was recommended in writing by the Board of Local Improvements, with a statement in the recommendation of the reasons therefor. The repealing ordinance, therefore, upon its face is invalid.

Second. Even if properly recommended by the Board

a very serious question of law arises as to whether or not such judgment vacated after the term of court had passed would not be a bar to another similar improvement. Section 56 of the Local Improvements Act apparently authorizes such thing to be done. I refer to the following part of said act:

“Nothing in this section contained shall interfere with the right of a petitioner to dismiss its proceedings, and for that purpose to vacate such judgment at its election at any time before commencing the actual collection of such assessment, and no judgment entered in such proceeding so dismissed and vacated shall be a bar to another like or different improvement.”

In the case of *Gage v. City of Chicago*, 193 Ill. 108, where the former proceeding was for paving the street with cedar blocks, and after judgment of confirmation the city abandoned the proposed improvement with cedar blocks, decided to pave the street with asphalt, and therefore repealed the ordinance, caused the judgment to be vacated and dismissed all proceedings under the same, and brought a new assessment for paving with asphalt, the court held that under the law of 1897 the city had that right, but you will observe the element of abandonment and of a materially different improvement existed in that case. The *Gage case*, therefore, can only be held to be an authority where there is an actual abandonment and a material change in the character of the improvement.

In *McChesney v. City of Chicago*, 161 Ill. 110, a case under the Cities and Villages Act, prior to the revision of 1897, where the original improvement was a six-inch water pipe, and the subsequent improvement an eight-inch water pipe, it was held that a judgment of confirmation of the former improvement vacated after the lapse of the term was a bar to the latter improvement. In that case the court said:

“We will not impute to the legislature the intention of nullifying the judgments and decrees of courts of general jurisdiction in advance, when it would be beyond the constitutional power of that body to do so after they were made,

and especially in relation to statutory proceedings to divest the citizen of his property without his consent.

"This is not an abandonment of the improvement, but an attempt to abandon a valid assessment after judgment and after the term, and to substitute another assessment for the same or substantially the same improvement. To allow this to be done would be to 'give undue advantage to one of the parties to the controversy and work a rank injustice to the citizen and property owners.' It would be unjust and oppressive to the tax-payer and contrary to the principles of the common law, that he should be subjected to the annoyance and expense of defending against a multiplicity of proceedings of the same kind for the collection of a single tax."

'The opinion above quoted from was delivered by Mr. Justice Magruder, and it is quite likely that if the case were again presented to him, even under the present law, he would still hold in accordance with his former opinion, that unless there was an actual abandonment and a substantial change in the improvement, the former judgment was a bar to subsequent proceedings.

Under the present statute, and in view of the two decisions above quoted, I am of the opinion that it is unsafe to vacate a judgment after the term, unless there is an actual determination to abandon the improvement and substitute a different one; that the repealing ordinance should recite not only the recommendation of the Board, but as reasons therefor, the fact of abandonment. The order of court to be entered should also contain full recitals of the same sort, together with the recital that the contract has not been let nor improvement bonds issued. Where these features do not exist, I recommend against the vacation of judgments after the term.

Very respectfully,

EDGAR B. TOLMAN,

Attorney Board of Local Improvements.

JUNE 22, 1903.

HON. L. E. MCGANN, City Comptroller.

Dear Sir:

You have requested the opinion of this department as to the present status of the Police Pension Board.

The act of July 1, 1887, amended by the acts of July 1, 1899, and July 1, 1901, was further amended by the act approved and in force May 16, 1903. Prior to the last amendment the Board of Police Pension Fund Commissioners was composed of the City Comptroller, the City Clerk, the Superintendent of Police, the City Treasurer and the City Attorney. Under the act of 1903, the personnel of the Board of Commissioners is completely changed. The board now is to be composed of five members, to be known as "The Board of Trustees of the Police Pension Fund" of the city. Three members must be residents of the city, and during their term of membership on the board may not hold any appointive or elective political office. They are appointed by the Mayor. Their term of office begins on the second Tuesday in May, 1903. One member serves for one year from that date, another for two, and the third for three years. The two other members of the board are chosen by election, one from the active police force of the city, the other from the pensioners who are the beneficiaries under the act. The electors are the members of the bodies from which the two trustees respectively are chosen. The election is to be held annually, on the third Monday of April, "under such regulations as shall be prescribed by the three appointive members of said board." We think it is apparent from these provisions that the election of the two official members should first be held in April, 1904. The election is to be held under regulations prescribed by the three appointive members. As their term of office does not begin until the second Tuesday in May, 1903, the April election for which they prescribe regulations, must be the April after May, 1903. By the express terms of the act, however, the term of office of the three appointive members begins on the second Tuesday in May, 1903. The act, then, manifestly contemplates that the duties of the board should, upon the appointment of the three members,

be performed by them alone until the election of the other two members in the following April. Their term of office is running during this time, and this, combined with their appointment, confers upon them full power to perform the function of the office. That is the evident intention of the statute.

The immediate question, however, arises from the fact that these members have not yet been appointed. That they may be appointed after the second Tuesday of May to an office the term of which begins to run on that day, is undoubted, but who should perform the duties of the Board of Commissioners or Trustees until the appointment is made? We are of the opinion that the old Board of Commissioners of the Police Pension Fund, as constituted under the act of 1887, as amended in 1889 and 1901, hold office until their successors are appointed and qualified.

This view is supported by "Mechem's Public Offices and Officers", Section 397:

"It is usually provided by law that officers elected or appointed for a fixed term shall hold not only for that term but until their successors are elected and qualified.

. . . Where, however, no such provision is made, the question of the right of the incumbent to hold over is not so clear, but the prevailing opinion in this country seems to be that, unless such holding over be expressly or impliedly prohibited, the incumbent may continue to hold until some one else is elected and qualified to assume the office.

"Such a rule seems to be demanded by the most obvious requirements of public policy, for without it there must frequently be cases where, from a failure to elect, or a refusal or neglect to qualify, the office would be vacant and the public service entirely suspended."

No good reason can be shown why this rule should not equally apply to a case where the places of former officers are taken by new officers selected by a different method, as in the present case.

We are, therefore, of the opinion that the old board is still in office, and may exercise all of the powers and should perform all the duties properly belonging to the Board of Trustees of the Police Pension Fund, and that the old board

retains office until the appointment and qualification of the three appointive members of the new Board of Trustees of the fund.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JUNE 26, 1903.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS
Gentlemen:

In a recent communication from your Honorable Board you request an opinion for the guidance of the Board as to how far and under what circumstances and conditions the Board of Local Improvements are subject to the orders of the Council, particularly having in view an opinion as to how far the Board are subject to the orders of the Council to stay assessment proceedings during the different stages thereof.

Section 5 of the Local Improvements Act provides:

“No ordinance for any local improvements, to be paid wholly or in part by special assessment or special taxation, shall be considered or passed by the City Council or Board of Trustees of any such city, village or town, unless the same shall first be recommended by the Board of Local Improvements provided for by this act.”

In *Givins v. City of Chicago*, 188 Ill. 348, the Supreme Court has passed upon the constitutionality of the act, and has construed this Section 5 as placing restrictions upon the power of the City Council, but that it is not compulsory upon the City Council to adopt *the ordinance as framed and presented by the Board of Local Improvements*. The City Council, except where the proceedings originated by a frontage petition, as provided by Section 34, may refuse said ordinance as recommended by your board.

When the improvement originates by frontage petition, under the provisions of Section 34, it is the duty of the council to adopt the “draft of an ordinance prepared and pre-

sented by the Board.” In support of this contention, I quote from pages 352 and 353 of opinion:

“Section 5 of the act is also a restriction upon the exercise of this power. It provides that no ordinance for such an improvement shall be considered or passed by the City Council or Board of Trustees unless it shall have first been recommended by the Board of Local Improvements. If this board has performed its duties it is fully informed of the necessity of the work, of the nature, character and cost of the improvement, and of the views and interests of those whose property is to be assessed to pay for it, before it makes its report and recommendation to the City Council or Board of Trustees. The corporate authorities could not act intelligently in such matter without first having obtained the information which, under the statute, it is the duty of the board to obtain before any ordinance can be adopted by the council. Preliminarily, the property owners have been notified and afforded a hearing. This opportunity for the property owners to be heard, as a preliminary step in the proceeding, is one of the important provisions of the act. Former statutes contained no similar provision.

“It is claimed, however, the Council or Board of Trustees has no discretion under the statute, but must adopt the ordinance as framed and presented by the Board of Local Improvements. This is a misapprehension of the meaning of the act. Section 34 contains the only provision which makes it the duty of the corporate authorities to adopt an ordinance providing for the improvement recommended by the board, and that is confined to cases where the owners of the greater part of the property in any one or more contiguous blocks abutting on the street or public place to be improved shall petition for the improvement. That section provides, among other things, that after the hearing before the board, and after it has determined the nature and cost of the improvement, it shall prepare and transmit to the legislative body—that is, to the corporate authorities—‘a draft of an ordinance therefor, together with an estimate of the cost, . . . and shall recommend the passage thereof, which recommendation shall be *prima facie* evidence that all

the preliminary steps required by law have been taken; and thereupon it shall be the duty of such legislative body to pass an ordinance for the said improvement, and take the necessary steps to have the same carried into effect.' This provision does not make it the duty of the council to pass an ordinance providing for the improvement because the Board of Local Improvements has recommended it, but because, primarily, the owners of the abutting property have petitioned for it. Nor is it made the duty of the council to adopt the 'draft of an ordinance' prepared and presented by the board, but only 'to pass *an* ordinance for the said improvement.'"

Section 1 of an act passed May 10, 1901, reads as follows:

"No repeal of any ordinance ordering an improvement shall be made except on written recommendation of the Board of Local Improvements (stating therein its reasons therefor)."

By analogy, if the reasoning of the Supreme Court in the *Givins* case, as above quoted, is correct as to the validity of Section 5, this section must be considered valid, and the City Council after once passing a valid improvement ordinance to be paid for by special assessment or special taxation, as provided by this act, cannot repeal the same without the recommendation of the Board of Local Improvements.

Section 7 of the Local Improvements Act provides:

"All ordinances for local improvement to be paid for wholly or in part by special assessment or special taxation shall originate with the Board of Local Improvements."

The City Council cannot encroach upon the powers conferred by this section, nor can the board relieve itself of the duties vested by statute. Any order of the council directing the board to cause an estimate to be prepared at a public hearing to be held by virtue of Section 7 as to any specific improvement is a nullity. The improvement *must* originate with the board. (*Middaugh v. City of Chicago*, 187 Ill. 230.) The City Council may request the Board of Local Improvements to consider the advisability of making certain improvements, and the board may, if it sees fit, cause an estimate to

be made at a public hearing to be held, as provided by Section 7, if in its wisdom it deems such action advisable.

By like reasoning any order of the City Council staying any proceedings carried on under this Local Improvements Act is a nullity and of no effect whatsoever. The City Council can no more infringe upon the powers and duties of the Board of Local Improvements, as prescribed by statute, than the Board of Local Improvements can legislate for the City Council.

Very respectfully,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JUNE 29, 1903.

MR. H. F. EIDEMANN, Chairman,

Sub-Committee Special Assessment and General Taxation.

Dear Sir:

In compliance with your request of the 24th inst., I have prepared a draft of an ordinance regulating the width of tires on vehicles, and herewith enclose same.

In my opinion the city unquestionably possesses the power to pass such an ordinance. Although the power to regulate the width of tires is not specifically conferred on municipalities by the Cities and Villages Act, yet it may be derived from the general grants therein enumerated which clothe municipalities with ample authority for this purpose.

“Under the special clauses in city charters, coupled with a ‘general welfare’ clause, it has been held that cities have the power to do almost anything proper and necessary to protect the public in the use of the streets.”

Elliott on Roads and Streets, Sec. 452.

And it has been expressly held that grants similar to those contained in Paragraphs 9 and 20 of the Cities and Villages Act which respectively delegate the power to regu-

late the use of the streets and to regulate traffic upon same, confer the authority to prescribe the width of tires on vehicles.

People v. James, 16 Hun. (N. Y.) 426.

Regina v. Pope, 1 Ont. 43.

State v. Rohart, 86 N. W. Rep. 93 (Minn.).

This question has not been actually decided in Illinois, but in the case of *City of Chicago v. Collins*, 175 Ill. 445, the Supreme Court in speaking of regulations which would be considered as a reasonable exercise of the power to regulate traffic and the use of the streets said in a dictum (p. 456) that the City Council could "regulate the width of tires on vehicles used on a certain character of pavements."

I would suggest that no department of the city be specially designated to enforce the ordinance. This suggestion is made on the recommendation of the City Prosecuting Attorney, to whom the enclosed draft was submitted, who stated that if such a provision were inserted it would necessitate proof in each case that the prosecution was begun by the department named; and furthermore the Prosecuting Attorney was of the opinion that better practical results would be obtained if the ordinance were left to be enforced as a general police regulation.

Very truly yours,

FRANK JOHNSTON JR.,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 1, 1903.

ARTHUR R. REYNOLDS, M. D., Commissioner of Health.

Dear Sir:

In response to your request of the 30th ult. that the Corporation Counsel advise you on the matter of issuing a license to a hospital coming under the General Hospital Ordinance and not required to file frontage consents, "where obstructing property owners have served the Mayor and the Commissioner of Health with written notice to the effect that they will sue and hold the city liable for damages in case the de-

partment issues or recommends the issuance of a license," I beg leave to state that in my opinion the issuance of such license in accordance with the General Hospital Ordinance, would create no liability whatever against the city for damages either now or subsequently.

The ordinance under which the license would issue is a police regulation passed for the purpose of controlling hospitals for the protection and welfare of the public, and the license itself is prescribed only as one of the means to this end. As has been repeatedly held by the Supreme Court of Illinois, the power to license may be exercised as one of the methods of regulating a pursuit or business under the police powers of a municipality.

Chicago Pkg., etc., Co. v. City of Chicago, 88 Ill. 221.

Kinsley v. City of Chicago, 124 Ill. 359.

The license confers no authority on the licensee to conduct or maintain a public nuisance, but on the contrary its very object is to assist in repressing and preventing injury to the health and comfort of the public.

Garrett v. State, 49 N. J. L. 94, 102.

In other words, the license in this case would be rather a restraint than a privilege.

In this view, even if the hospital so licensed should subsequently become a nuisance, it could not possibly be maintained that the city created or conducted the nuisance by issuing the license.

And unless the city created or maintained the nuisance, the mere fact that it exists and has occasioned injury to a third party does not render the city liable therefor.

Shearman & Redfield on Negligence, Vol. 1 (5th Ed.), Sec. 262.

It is well settled that a municipality is not liable in damages for not suppressing a public nuisance, when such nuisance is not created or maintained by the municipality.

Leonard v. City of Hornellsville, 41 App. Div. 106 (Supreme Court, Appellate Div., New York).

State v. Town of Burlington, 36 Vt. 521.

Shearman & Redfield on Negligence (supra).

On the authorities and reason as well, I am of the opinion that the license may be safely issued.

Very truly yours,

FRANK JOHNSTON JR.,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 11, 1903.

MR. WILLIAM MAVOR, Chairman Committee on Finance.

Dear Sir:

I am in receipt of your letter of June 10, requesting an opinion "as to the legality of that part of the water ordinance which provides that where water mains are in the streets and no water in the premises, the owner of the premises must pay a certain portion of the frontage rates." The ordinance of May 12, 1902, provides for the assessment of a frontage rate "on each and every building fronting on any street, avenue, or other public highway, in or through which any public water supply pipe is laid," and that in case of a vacancy seventy-five (75) per cent of the rate shall be rebated, the remainder being levied for general maintenance.

Every municipality in this State, that operates a water-works system, is, in so doing, acting in its private capacity, and it is not exercising a governmental function. (*Wagner v. City of Rock Island*, 146 Ill. 139.) The consequence is that the furnishing of water to its citizens is purely a matter of contract and the city can only collect for the "use and benefit of water use or supplied." (*Village of Lemont v. Jenks*, 197 Ill. 363.)

If the pipes in A's house are connected with the city's mains and water is drawn through them and used, the city can collect the amount stipulated in the contract which consists of A's application and the ordinance prescribing the rate.

If the pipes in B's house are connected with the city's mains and B asks that the water be turned on, he thereby makes a contract for water so supplied at the rates and for

the period fixed by the ordinance, and must pay the contract price. The ordinance, however, provides that where the use of water so supplied is discontinued B can have a rebate, and this should be allowed to him.

If there are no pipes connecting C's house with the city's mains, C cannot be compelled to pay anything for water even as a frontage rate for there is no contract between the parties.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JULY 13, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

I herewith submit an opinion in answer to the recent resolution of your honorable body wherein you direct that the Corporation Counsel report to the City Council at "what length of time ordinances reported from the Board of Local Improvements for street improvements can be held up or delayed by the Council to the end that the members of the Council in the future may be able to determine the Council's legal authority as to its powers in the matter of local improvements, or its rights to stay collections upon warrants."

First. In answer to the question as to "what length of time ordinances reported from the Board of Local Improvements for street improvements can be held up or delayed by the Council," I beg leave to reply that the statute places no restriction upon the City Council as to the length of time ordinances reported from the Board of Local Improvements "can be held up or delayed by the City Council," except as to those improvements recommended by the board which originate by a frontage petition, as provided under Section 34 of the Local Improvements Act, in which case it is the duty of the City Council to adopt "a draft of an ordinance pre-

pared and presented by the board" (*Givins v. City of Chicago*, 188 Ill. 348), and with reasonable promptness. However, as a matter of public policy, it would be unwise in any instance to delay the consideration by your honorable body of such public improvements. Should the consideration of such ordinances be deferred for a considerable length of time, the conditions, which existed at the time of the public hearing by the board, and at the time the board recommended such improvement, might be greatly changed. (*Bass v. City of Chicago*, 195 Ill. 109.)

Second. Concerning "the Council's legal authority as to its powers in the matter of local improvements," I beg leave herewith to answer:

Section 5 of the Local Improvement Act provides:

"No ordinance for any local improvements, to be paid wholly or in part by special assessment or special taxation, shall be considered or passed by the City Council or Board of Trustees of any such city, village or town, unless the same shall first be recommended by the Board of Local Improvements provided for by this act."

In *Givins v. City of Chicago*, 188 Ill. 348, the Supreme Court has passed upon the constitutionality of the act, and has construed this Section 5 as placing restrictions upon the power of the City Council, but that it is not compulsory upon the City Council to adopt *the ordinance as framed and presented by the Board of Local Improvements*. The City Council, except where the proceedings originated by a frontage petition, as provided by Section 34, may refuse to pass said ordinance as recommended by the board.

When the improvement originates by frontage petition, under the provisions of Section 34, it is the duty of the Council to adopt the "draft of an ordinance prepared and presented by the board."

Section 1 of an act passed May 10, 1901, reads as follows:

"No repeal of any ordinance ordering an improvement shall be made except on written recommendation of the Board of Local Improvements (stating therein its reasons therefor)."

By analogy, if the reasoning of the Supreme Court in

the *Givins case*, as above cited, is correct as to the validity of Section 5, this section must be considered valid, and the City Council, after once passing a valid improvement ordinance to be paid for by special assessment or special taxation, as provided by this act, cannot repeal the same without the recommendation of the Board of Local Improvements.

Section 7 of the Local Improvements Act provides:

“All ordinances for local improvement to be paid for wholly or in part by special assessment or special taxation shall originate with the Board of Local Improvements.”

The City Council cannot encroach upon the powers conferred by this section, nor can the board relieve itself of the duties vested by statute. Any order of the Council directing the board to cause an estimate to be prepared at a public hearing to be held by virtue of Section 7 as to any specific improvement is a nullity. (*Walker v. City of Chicago*, 202 Ill. 531.) The improvement *must* originate with the board. (*Middaugh v. City of Chicago*, 187 Ill. 230.) The City Council may request the Board of Local Improvements to consider the advisability of making certain improvements, and the board may, if it sees fit, cause an estimate to be made at a public hearing to be held, as provided by Section 7, if in its wisdom it deems such action advisable.

By like reasoning any order of the City Council staying any proceedings carried on under this Local Improvements Act is a nullity and of no effect whatsoever. The City Council can no more infringe upon the powers and duties of the Board of Local Improvements, as prescribed by statute, than the Board of Local Improvements can legislate for the City Council.

Third. As to the authority of the City Council “to stay collections upon warrants”, I beg leave to reply that Section 56 of the Local Improvement Act provides:

“No judgment shall be vacated or modified or any petition dismissed at a term subsequent to that at which the judgment was rendered, nor the collection of the assessment be in any way stayed or delayed by the Council or Board of Trustees, or Board of Local Improvements, or any officer of

the municipality, without the consent of the contractor and bondholder."

It, therefore, clearly appears under what conditions a warrant may be withdrawn from collection, the City Council having no power or authority to stay the collection of a warrant based upon a valid proceeding. (*Wisner v. The People*, 156 Ill. 182.)

Respectfully submitted,
 ROBERT REDFIELD,
Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JULY 14, 1903.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

Your favor of the 9th inst., requesting the Corporation Counsel's opinion "as to whether Sections 200, 201, 202 and 203 of the City Building Ordinance, or any part of them, apply to elevators in office buildings as defined class two (2) in Section 65 of said building ordinance or do they apply only to class one (1) as defined in Section 65," was duly received.

Office buildings come within a class of buildings designated as class two (2) by Section 65 of the building ordinances.

That part of Section 200 which it is necessary to consider is as follows:

"Whenever elevators in non-fireproof buildings, or in fireproof buildings of Class 1, are built without enclosing walls, there shall be at every floor through which they pass, automatic closers or automatic doors made in such manner that they will fully close the well hole when the temperature in such well hole exceeds 140 degrees Fahrenheit."

I think that a reasonable construction of this section would mean all elevators in non-fireproof buildings and therefore all elevators in non-fireproof office buildings. In other

words, I think that not only buildings of Class 1 are intended by the section, but that the buildings contemplated are all of those which are non-fireproof, including any non-fireproof building in Class II of Section 65, and also fireproof buildings of Class I.

Section 201 provides as follows:

"If such hatch holes are not supplied with hatch closers or doors, as before described, the elevator well shall be enclosed, in all non-fireproof buildings, with an entirely self-supporting wall of brick or tile extending from the foundation to a height of six feet above the roof of the building in which such elevator occurs, and in buildings of fireproof construction the walls or partitions enclosing such elevator shafts, which may be of light construction, but which must be incombustible, may be carried from story to story upon the construction of the same."

It is clear that the provisions of this section apply to office buildings.

By Sections 202 and 203, it is provided respectively:

"All elevator shafts and all elevator enclosures of every kind shall have iron doors which shall be made to open from the inside only, excepting only the door upon the ground floor of the building, which shall also have a lock to permit opening the same from the outside."

"The roof of each elevator shaft shall be formed by a skylight, and have a ventilator at least one twentieth the area of the shaft. Skylights and ventilators may be omitted where there are windows in shafts opening on streets, alleys or courts."

From the language of these two sections, there can be no doubt but that all buildings are contemplated and consequently office buildings, whether fireproof or non-fireproof.

Very truly yours,

FRANK JOHNSTON JR.,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JULY 17, 1903.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

Your letter enclosing reports from Capt. Gibbons relative to the Sherman House saloons, in which you request an opinion as to whether two licenses are required for the saloons mentioned in the report, has been referred to me.

If the business of the saloon is that of catering to the wants of the guests of the hotel, the proprietor may have as many bars or bar rooms as he pleases and but one license will be required. If, however, an effort is made to attract trade from the street, and the two bar rooms are so disconnected that a person entering one of them would have no occasion to know that there is another under the same roof, then there must be a license for each place.

Herewith we return Capt. Gibbons' report.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 23, 1903.

FRANCIS O'NEILL, Superintendent of Police.

Dear Sir:

In response to your favor of January 27, 1903, regarding the status of a police officer who has been retired from the police force under the provisions of Sections 3080 and 3081, Municipal Code, and the acts of the General Assembly, and particularly an act of the Legislature approved May 16, 1903, entitled "An Act to Amend Sections 1, 2, 3, 4, 6, 9, 10 and 11 of an act entitled 'An Act to provide for the setting apart, formation and disbursement of a police fund in cities, villages and incorporated towns,' " approved April 29, 1887, in force July 1, 1887, as amended by an Act approved May 11, 1901, in force July 1, 1901.

Sections 3 and 4 of the Act of May 10, 1903, amending (among others) Sections 3 and 4 of the Act of 1887, create

two classes of persons who may participate in the pension fund created by legislative enactment.

First. As to the persons included in Section 3 of the Act of 1903, the provisions are as follows:

“Whenever any person at the time of the taking effect of said act, to which this is an amendment, or thereafter shall be duly appointed and sworn, and have served for the period of twenty years or more upon the regularly constituted police force of such city, village or town of this State, subject to the provisions of this act, or where the combined years of service of any person upon the police force and the fire department, as aforesaid, of such city, village or town of this State, shall aggregate twenty years or more, said board shall order and direct that such person after becoming fifty years of age and, his service on such police force shall have ceased, and all officers entitled to and having a pension under said act, to which this is an amendment, after the taking effect of this act shall be paid from such fund a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement; *Provided*, however, the maximum of said pension shall not exceed the sum of \$900 and the minimum not less than \$600. And after the decease of such member, his widow or minor child or children under sixteen years of age, if any survive him, shall be entitled to the pension provided for in this act, of such a deceased husband or father, but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of said police department after she shall have remarried. And, provided further, that all police officers retired after twenty years’ service in the police department of such city, village or town, and who are above the age of fifty years now on the police pension rolls shall receive the same pension now allowed them; *Provided*, that in no case shall said pension exceed the sum of \$900.”

The persons of the first class enumerated in the foregoing section who have arrived at the age of fifty years and have in addition served twenty years upon the police force and whose

service shall have ceased, shall, upon the direction of the Pension Board (and such direction is made mandatory), enjoy a pension for a certain period, subject to its loss through misconduct. The severance of their connection with the force is made a condition precedent to the action of the Board placing them upon the pension roll and must be as fully complied with and satisfied as the other two conditions, namely, the twenty years' previous service and the arrival at the age specified. This construction, in my view, is strengthened by the fact that whereas in the following Section 4 certain specific duties are provided for pensioned officers during an emergency, the Legislature makes no mention of the performance of any further duties by the persons under the class provided for in Section 3. The persons pensioned under Section 3, in my opinion, are, so far as official duties and powers are concerned, merely private persons and vested with no authority as police officers and can exercise none of the functions of the police or constabulary. As private persons they may make an arrest without a warrant, for a criminal offense committed or attempted in their presence, or to assist an officer.

Sec. 4, Div. 6, Chap. 38, Hurd's Rev. Stat., 1901.

Siegel, Cooper & Co. v. O'Connor, 70 Ill. App. 116.

Kindred v. Stitt, 51 Ill. 407.

The second class of pensioned persons is enumerated by Section 4 of the Act of 1903, and provides:

“Whenever any person, while serving as a policeman, in any such city, village or town, shall become physically disabled while in, and in consequence of the performance of his duty as such policeman, said Board shall, upon his written request, or without such request, if it deem it for the good of said police force, retire such person from active service, and order and direct that he be paid from said fund a yearly pension not exceeding one-half the amount of the salary attached to the rank which he may have held on said police force at the time of his retirement; *Provided*, That the maximum sum of such pension shall not exceed the sum of \$900 per year, and the minimum not less than \$600 per year; *Provided, further*,

That whenever such disability shall cease such pension shall cease."

The Legislature, in this section, evidently contemplates the separation of the disabled person from his position temporarily and in a limited manner. The retirement of such person by the Board is discretionary and not mandatory as in Section 3. Section 7 of the Act of 1887, and Section 3084 of the Municipal Code, 1897, hold persons drawing pensions thereunder subject to duties and emergency calls by the Chief of Police.

"Any person retired for disability under this Act may be summoned to appear before the Board herein provided for, at any time thereafter, and shall submit himself thereto for examination as to his fitness for duty, and shall abide the decision and order of such Board with reference thereto. And all members of the police force who may be retired under the provisions of this Act, except those who voluntarily retire after twenty years' service, shall report to the chief of police of the city, village or town where so retired, on the second Tuesday of each and every month, and in cases of emergency may be assigned to, and shall perform such duty as said chief of police may direct, and such persons shall have no claim against the city, village or town for payment for such duty so performed."

It will be noticed that Section 7 specifically excepts from the operation thereof, persons pensioned under the provisions of Section 3, relieving such persons from any of the duties and obligations of Section 4, which, in my opinion, shows the intention of the Legislature to exclude those persons classed in Section 3 from any connection with police duties. I am of the opinion that persons of the class drawing pensions under Section 4, while assigned to and performing duty in an emergency under the direction of the General Superintendent of Police, have all the authority and powers of regular police officers of this city conferred by Section 2, Division 6, Chapter 3, Hurd's Revised Statutes.

"It shall be the duty of every sheriff, coroner, constable and every marshal, policeman, or other officer of any incorporated city, town or village, having the power of a sheriff or

constable, when any criminal offense or breach of the peace is committed or attempted in his presence, forthwith to apprehend the offender and bring him before some justice of the peace, to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants, writs, precepts and other process to him lawfully directed."

And also Section 1509, Article 3, General Ordinances of the City of Chicago, Municipal Code of 1897:

"They shall have power to arrest all persons in the city found in the act of violating any law or ordinance or aiding or abetting in any such violation, and shall arrest all persons found under suspicious circumstances, and shall take all such persons so arrested to the place designated by such ordinances, rules and regulations."

In conclusion, my opinion is that the pensioners of the superannuated class are not available for police duties, but persons of the class retired on account of disability may be employed by the Chief of Police for such duties during an emergency.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 24, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Replying to your letter of the 21st inst., in regard to the claim of E. Listenwalter for alleged damage due to the destruction of a tree situated midway between the curb and the sidewalk in front of the premises known as No. 5448 Cornell avenue, by reason of the construction of the intercepting sewer along and through that street, I beg leave to say that since the legal title to streets and sidewalks is in the city, any improvement or adornment thereon is not the property of the abutting owner.

“Shade trees in the public streets of a city are the property of the municipality, and it has complete control over them.”

City of Mt. Carmel v. Shaw, 155 Ill. 43.

Besides, the report shows that there was no neglect or carelessness on the part of the city in doing the work which resulted in the alleged damage to the tree.

I am therefore of the opinion that there is no legal liability on the part of the city to Mr. Listenwalter.

I understand it, however, to be your policy to restore existing conditions as nearly as may be, after the construction of the intercepting sewer, and you would therefore be entirely at liberty, if you saw fit, to replace the tree in question.

Very truly yours,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 24, 1903.

J. F. SMULSKI, Esq., City Attorney.

Dear Sir:

In reference to the case of Henry Walter vs. The City of Chicago, which has been referred to this office by you for the expression of an opinion as to the advisability of a settlement by the city and certain railroad companies with the plaintiff, in accordance with draft of agreement hereto attached, I am disinclined to sanction any adjustment of this claim unless made without contribution on the part of the city. From the conclusions I have reached and have stated below, I can find no basis of any *ultimate* liability on the part of the city, and think the taxpayers of this municipality should not be called upon to indemnify railroad corporations, even in part, on account of damages growing out of the negligent acts of such corporations. As to the statutory liability of these companies to repair the Thirty-fifth street viaduct. Section 8, Chapter 114 of the Act of 1874, relating to fencing and operating railroads, provides:

“Hereafter, at all of the railroad crossings of highways and streets in this State, the several railroad corporations in this State shall construct and maintain said crossings and the approaches thereto within their respective rights of way so that at all times they shall be safe as to persons and property.”

From an examination of the ordinances of the City of Chicago with reference to the rights and liabilities of the railroads and street railways crossings under and upon this viaduct, I find no expressed agreement on their part to repair it, but it is a well settled principle of the common law resting upon the most obvious considerations of justice that any person or corporation that cuts through a highway for the benefit of such person or corporation, must furnish the public a proper crossing, even though acting under a license from the proper authorities.

The following ordinances touch upon this question in a measure:

Revised Code, 1897, p. 587: Ordinance passed Sept. 15, 1879.

Revised Code, p. 590: Ordinance passed August 15, 1883, with reference to the Chicago & Western Indiana Railroad Co.

Revised Code, p. 729: Ordinance passed September 12, 1887, Section 14, with regard to the Pittsburg, Ft. Wayne & Chicago Railroad Co.

Special Ordinances of the City of Chicago, p. 1147: Ordinance passed March 21, 1892, with reference to the Chicago City Railway Company.

I am informed by the Department of Public Works that there is no contract or agreement on file in that department with reference to the liability to repair this viaduct on the part of the Chicago & Western Indiana Railway Co., and the Chicago & Eastern Illinois Railway Co., and the Chicago City Railway Co. I assume therefore that any contractual liability to maintain and repair this viaduct is covered by the sections of the ordinance referred to above.

The viaduct in question was built in the year 1889, and in the year 1898, workmen of the railroads above enumerated,

under a permit from the Department of Public Works of the City of Chicago, were making certain repairs upon the viaduct. Assuming that there is no direct contract with the railroads in question to maintain said viaduct in a reasonably safe condition for pedestrians or teams, I am of the opinion that these companies through the negligent acts of their servants are liable to the city for whatever damages may be recovered against it in an action by a person injured through a defective condition of said viaduct. A leading case on this question of the liability over to a corporation for damages received, is the case of *Chicago v. Robbins*, 3 Blackwell's Reports. (U. S., p. 418.) In that case the court said:

"A municipal corporation having the exclusive care and control of the streets is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that may prove dangerous; if this duty be neglected, and in consequence thereof, any one is injured, the corporation will be liable for the damages sustained. The corporation, has however, a remedy over against a private party who has so used the streets as to produce the injury, unless the corporation concurred in the wrong. . . . A private party is concluded by a judgment recovered against the corporation for his act or negligence, if he knew that the suit was pending and could have defended it. An express notice to such party to defend the suit is not necessary to create his liability."

This doctrine is upheld in the following cases:

Robbins v. Chicago City, 4 Wallace, 657.

Brooklyn v. Railroad Co., 47 N. Y. 475.

Boston v. Worthington, 10 Gray, 496.

Westfield v. Mayo, 122 Mass. 100.

People v. Brooklyn, 65 N. Y. 349.

City of Rochester v. Montgomery, 72 N. Y. 66.

Port Jarvis v. First National Bank, 96 N. Y. 550.

Mayor, etc., of Troy v. Troy, etc., R. R., 49 N. Y. 657.

City of Lowell v. Short, 4 Cushing, 275.

In this State only a municipal corporation is compelled to pay a judgment to a person injured by a defect in a street or sidewalk. Such corporation may recover over against the

person who by negligence or by a wrongful act created the obstruction, excavation or defect which caused the injury.

Gridley v. City of Bloomington, 68 Ill. 47.

Fahey v. Town of Howard, 62 Ill. 28.

It has also been held that one who receives a permit from the proper municipal authorities to dig in the streets receives such license or permission under an *implied agreement* to perform such act in such a manner as to save the public who use the street from danger and the municipality from liability; and where a suit is brought against the city for damages caused by the act of one who obstructs or excavates in the street, and such person has notice of the suit, the judgment will be conclusive against him in an action by the city to recover over the amount it has been compelled to pay, so far as relates to all matters necessarily included in the adjudication which comprises the existence of the defect, the injury, the liability of the corporation and the amount of damages recovered.

From the authorities above quoted, I am of the opinion that should the plaintiff Walters recover a judgment against this city upon a new trial in the Superior Court, there is abundant authority for the position that the city could in such an event recover over against the railroads whose tracks are laid over and upon the viaduct in question, or who have received permission to use, operate and construct their lines of road across the street of which this viaduct form a portion.

Respectfully submitted,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 25, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

I beg leave to call your attention to the provisions of Section 82, Ch. 30, of the Revised Statutes of Illinois (The Torrens law), which reads as follows:

“The holder of any certificate of sale of registered land

or any estate or interest therein for any tax, assessment or imposition shall, within three months after the date of sale, present the same, or a sworn copy thereof, to the registrar, who shall thereupon enter on the register of the land a memorial thereof, stating the day of sale and the date of presentation, and shall also note upon the certificate of sale the date of presentation and the book and page of the register where the memorial is entered. The holder of such certificate shall also, within the same time, mail to each of the persons who appear by the register to have any interest in the land, a notice of the registration of such certificate. Unless such certificate is presented and registered, and notice given as herein provided within the time above mentioned, the land shall be forever released from the effect of such sale, and no deed shall be issued in pursuance of such certificate. When it shall appear by the affidavit of the holder of the certificate filed with the registrar that the place of residence of any person interested in the land cannot upon diligent inquiry be ascertained the requirement of this section as to mailing notice shall not apply to such person."

This statute requires the city to present to the registrar of titles its certificates of sale, or sworn copies thereof, within three months after the date of sale, in order to hold registered land. It has been called to my attention that this has not been done. The assessments involved were not, however, necessarily lost to the city. Section 60 of the Local Improvements Act provides in part as follows:

"If, from any cause, any city, village or town shall fail to collect the whole or any portion of any special assessment or special tax which may be levied, which shall not be cancelled or set aside by the order of any court, for any public improvement authorized to be made and paid for by a special assessment or special tax, the City Council or Board of Trustees may, at any time within five years after the confirmation of the original assessment, direct a new assessment to be made upon the delinquent property for the amount of such deficiency and interest thereon from the date of such original assessment, which assessment shall be made, as nearly as may be, in the same manner as is herein prescribed

for the first assessment. . . . And it shall constitute no legal objection to such assessment that the property may have changed hands or been encumbered subsequent to the date of the original assessment."

New proceedings can therefore be taken for the enforcement of the collection of said assessment against said land. This, however, involves expense and delay, and I suggest that the person in your office who has charge of tax sales be instructed upon receipt of certificates of sale to present the same at once to the registrar for the purpose of ascertaining whether or not the land therein described is registered, and if so, to cause the necessary endorsement to be made on the certificate and the appropriate memorial entered upon the register.

Very respectfully,
EDGAR B. TOLMAN,
Corporation Counsel.

JULY 25, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

In your letter of recent date you enclosed a communication from the Superintendent of Water, herewith returned, requesting an opinion concerning water rates for "extra persons" in rooming houses.

It seems clear that the term "boarding houses", standing alone, would not comprehend "rooming houses", and whether a building is a lodging house, boarding house or hotel depends upon the circumstances of each particular case. And further in construing the clause of Class 2, Section 17 of the Ordinance of May 12, 1902, under discussion, relating to rates for "extra persons", to determine whether rooming houses are subject to its provisions, no aid can be derived from the other parts of Class 2, except that an intention appears that rooming houses shall be subject to some of the provisions of Class 2, for the two provisions of Class 2 concerning water fixtures, when taken together, are in such conflict as to be meaningless. But considering the clause here under consideration, in connection with Classes 1, 2, 3, 4, 5,

6 and 10 of Section 17, the other parts of Section 17 relating to "extra persons", and Section 3, the general purpose of the ordinance seems to be to make extra water charges in buildings used for living purposes, whether public or private, and whether for residents or transients, depend not only upon the number of fixtures but also upon the number of persons, although in the case of hotels exceeding twelve rooms (Class 3) to attain this object the assessment is made to depend upon the capacity for extra persons instead of upon the number of occupants. In view of the fact that private hotels, dwellings, boarding houses, hotels, flats, office buildings, stores, saloons, stables; boarding schools, etc., are made subject to these extra charges, a deliberate intention to except rooming or lodging houses cannot be ascribed to the council without some good reason, and not only is good reason lacking for such an exception, but the general provision in Section 3 and the use of the words, "occupied by" in the clause under discussion clearly negative any such intention. Therefore, it may be concluded that the omission of the words "rooming house" from the clause in question, was an oversight, which can be remedied by supplying the omitted words between the words, "boarding house" and the words "occupied by", and if necessary in the following sentence by supplying the words "or roomer" after the words "every boarder", or to put it differently, the words "boarding house" as used in this clause should be construed as embracing "rooming houses."

In the case of *Burke v. Monroe County*, 77 Ill. 610, where one part of the statute used the words "towns and cities", and in a subsequent part the word "city" only was used, it was held that if courts "find, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the statute, if, upon a view of the whole act, they can collect from the more large and extensive expressions used in other parts, the real intention of the legislature, it is their duty to give effect to the larger expressions."

Also, *Brinsfield v. Carter*, 2 Ga. 143;

Landrum v. Flannigan, 60 Kansas 436;

People, ex rel. vs. Hoffman, 97 Ill. 234.

In view of the general prohibition in Section 3 against occupants or owners of buildings supplying water to other persons, it is necessary for any person guilty of violating this provision, in order to escape its penalties, to show his permission from the proper authority or to bring himself within some of the exceptions in the ordinance, because the legislative enactment that "creates the limitation must also create the exception". *Pryor v. Ryburn*, 16 Ark. 671.

Also *Chicago, Milwaukee & St. Paul R. R. Co. v. Dummer*, 109 Ill. 402.

By taking Section 3 in conjunction with Sections 4, 5, 6, 7, 10 and Section 17, Class 12, it is apparent that the Commissioner of Public Works is the legally designated authority from whom permission must be obtained to supply water to extra persons. Accordingly, it is suggested as a practical solution of the question submitted, that the rooming house owner will probably accept the construction of the Superintendent of Water, which includes the building of the former in "boarding houses", if threatened with the shutting off of the supply of water. The vesting in the Commissioner of Public Works by this ordinance of the powers thereby granted, including the power to apply or to fix water rates, which is given in Section 17, Class 12, does not constitute a delegation of legislative power. It is necessary to entrust discretion to some officer or board, as it would be impracticable, if not impossible, to specifically enumerate or specify in the ordinance the numberless kinds of business and living uses to which buildings in a large municipality may be applied, and the delegation to the Commissioner of Public Works of the power to determine, when fixing water rates for "extra persons" in what class buildings devoted to a certain use, not covered by the ordinance, shall be placed as a condition of being relieved from the operation of the prohibition and penalties of Section 3, is not a delegation of legislative power.

Arms v. Ayer, 192 Ill. 610.

C., B. & Q. R. R. Co. v. Jones, 149 Ill. 361.

State v. Wagener, 80 N. W. 633, 637.

Field v. Clark, 143 U. S. 649, 680, 693.

Therefore, the Commissioner of Public Works has the

power, where a particular kind of building is not covered by the ordinance, to fix the rates to be paid for extra persons, provided he acts reasonably in so doing and applies the same rates to all buildings of the same kind.

It follows, then, from what has been said, that if under the circumstances of this particular case the building in question is a "rooming house" it falls within the term "boarding houses" so far as the payment by its owner of these rates for "extra persons" is concerned. But if under the circumstances the building in question does not come within the term "rooming house" or "boarding house" or any other class of buildings specifically named in the ordinance, then the Commissioner of Public Works may fix the water rates for this and other buildings of the same character by applying the rates provided for buildings of a similar nature, as a condition of giving the permit mentioned in Section 3.

Yours truly,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 27, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Your favor of the 20th inst. in reference to Washington Heights Warrant 31, addressed to Edgar B. Tolman, the Corporation Counsel, received.

According to your communication this was a special assessment levied to defray the cost of an improvement in the Village of Washington Heights, the contract being awarded to Messrs. Hodgkins, Moffat & Clark, who made a deposit of two thousand dollars which sum was afterward declared forfeited, the firm repudiating the contract. This sum was applied to the public benefits assessed against the Village of Washington Heights, Hodgkins, Moffat & Clark afterwards recovering judgment against the City of Chicago for this two thousand dollars.

You inquire of this office whether the above judgment should be satisfied out of the funds to the credit of the warrant at once, whether it should be classed as a liability of the warrant and entitled to a pro rata share of the funds on hand or whether it is an obligation of the City of Chicago payable out of the general funds. In my opinion, in view of the fact that this deposit of Messrs. Hodgkins, Moffat & Clark was used by the village towards the payment of part of its share of the cost of the improvement, as assessed by the Commissioner, and the private property assessed received no benefit of this deposit, the judgment should not be satisfied out of the credit of this warrant, but should be charged as an obligation of the City of Chicago payable out of its general funds.

Very respectfully,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 28, 1903.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Your letter of recent date with enclosures from the Deputy Commissioner of Public Works and the Bench Engineer, duly received. These letters present the question whether or not it is now proper for the grade of Canal street to be changed by ordinance from 11.5 feet to 10 feet above city datum.

The street is now under contract for the construction of a pavement pursuant to an ordinance providing for such improvement by special assessment.

The statement is made in the letters that the ten foot grade would be much better for that point, that it would diminish the cost of the improvement by lessening the amount of filling required, and that the construction of the street at the higher grade would be a serious damage to business interests at that point, which are adjusted to the ten foot grade.

Since every improvement constructed by special assess-

ment must rest upon a valid ordinance, I advise against any action being now taken by ordinance of the City Council for the change of said grade. It might be contended hereafter that the passage of such an ordinance operated to repeal (in part, at least) the improvement ordinance. Any formal action on the part of the City Council at this time could do no good and might give rise to the technical objection above suggested. I am, however, of the opinion that you may direct your engineers to give to the contractor ten foot levels and require the construction of the improvement at such grade. Since, however, the contractor has already submitted his bid on the basis of the ordinance and has presumably taken into account the additional filling required by the higher grade, arrangements should be made with him for an equitable allowance equivalent to the saving in cost secured by the lower grade. The amount of this reduction in cost will, on the filing of your final report, result in a pro rata reduction of the assessment, so that the property owners will receive the benefit thereof. I am of the opinion that this course will not endanger the collection of the assessment or make it possible for any property owner, by objections to application for sale, to escape the payment of his fair share of the cost of the improvement. Section 83 of the Local Improvements Act provides that the action of the board in accepting the improvement shall be conclusive on all persons and property assessed therefor that the work has been performed substantially according to the requirements of the ordinance therefor, and that if any property owner be injured, his remedy shall be by an action on the case against the municipality. This statute applies in all cases, except where the variance from the ordinance is so great as to constitute the improvement another and different improvement from that described in the ordinance. If this improvement be constructed in all other respects in accordance with the ordinance, contract and specifications, both as to quality and material, the mere change of grade, under the circumstances above stated, will not, in my opinion, constitute it another and a different improvement than the one described in the ordinance. *Wells v. The People*, 201 Ill. 435. Moreover, even

at application for judgment, the property owner cannot defeat the collection of the assessment upon a mere imaginary or theoretical complaint, not involving any question of jurisdiction or power. He must show that he has been injured by the act complained of. *Farrell v. W. C. P. Commissioners*, 182 Ill. 250 (253); *Glover v. The People*, 194 Ill. 22.

The facts contained in the letters of the Deputy Commissioner and the Bench Engineer above referred to conclusively show that the change of the grade will not be an injury, but on the other hand a benefit to all concerned.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JULY 28, 1903.

MR. E. B. ELLICOTT, City Electrician.

Dear Sir:

I have the applications of the United Telegraph, Telephone and Electric Company, dated June 11, 1903 (1), For permission to set two 40 ft. poles and one 45 ft. pole in the alley south of 43d street, between Langley avenue and Champlain avenue; (2) To set four 40 ft. poles in the alley west of Langley avenue, between the alley south of 43d street and 44th street; (3) To set three 40 ft. poles and one 45 ft. pole in the alley west of Evans avenue, between the alleys south of 43d street and north of 44th street; (4) To set three 40 ft. poles in the alley north of 44th street between the alley west of Cottage Grove and Langley avenues; also the application of said company of July 16, 1903, for permission to set ten 40 ft. poles in the alley east of Vincennes avenue between 40th and 42d street.

This office has been heretofore informed by you that this company is the successor of the Hyde Park District Telegraph and Electric Company, to which a grant was made by ordinance of the Village of Hyde Park of the date of January 29, 1889; said ordinance being published at page 138 of the Special Ordinances of Chicago, known as Vol. 2 of the Revised Code of 1897. Section 2 of said ordinance reads as follows:

"All wires or electric conductors and the supports thereto permitted to be erected under this ordinance shall be placed under the general supervision of the Superintendent of Public Works of the Village of Hyde Park, providing that in all cases where said company desire to make use of any street or alley, they shall first obtain permission from the Board of Trustees of the Village of Hyde Park, subject to the consent of a majority of the property owners abutting on said street or alley; said consent of said property owners must be in writing and accompany said petition, providing that said company may place their circuits or wires wherever ordered by the Board of Trustees of the Village of Hyde Park, for public benefit."

The rights granted to the Hyde Park District Telegraph and Electric Company would accrue to its successors or assigns, subject to the same conditions.

Section 1640 of Vol. 1 of the Revised Code of Chicago (1897), is as follows:

"In all cases where provision is made by ordinance that the consent of the Commissioner of Public Works shall be obtained to authorize any act to be done, he may grant a permit therefor, subject to the restrictions of the ordinances in relation thereto, *and in cases where the ordinances of annexed cities, towns or villages granting privileges and rights in the streets, alleys and public grounds for different purposes, contain the provision that the President and Board of Trustees must in each instance grant permission for any specific work under the ordinance, authority is hereby vested in the Commissioner of Public Works to grant such permission in lieu of said President and Board of Trustees.*"

It will therefore be necessary for the company *first* to obtain the permission of the Commissioner of Public Works, and *second*, to obtain the consent of a majority of the property owners abutting on said streets or alleys, which consent must be in writing and accompany the petition.

I can see no legal objection to the issuance by the Commissioner of Public Works of the permits applied for, providing the territory is all within the old Village of Hyde Park. The question of whether or not the necessary frontage con-

sents have been obtained is one of fact to be determined by you or the Commissioner of Public Works.

Please find enclosed applications and papers attached thereto.

Very truly yours,

WILLIAM H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 29, 1903.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

In answer to your favor of July 22d, in reference to the claim against James H. Roche for the cost of supporting tracks on account of the construction of a sewer in 113th street, I beg leave to reply that a railroad corporation, using the public highways, enjoys this privilege subject to a certain reasonable and temporary interference caused by the necessities of the public. Such a reasonable interference with the rights of a railroad corporation by the public would be the construction of a sewer in 113th street, referred to in your communication. The expense incurred, for the purpose of maintaining the service of the company during the construction of the improvement under the tracks of the railroad company, should be borne by the railroad company. However, it is proper that the contractor should bear all expenses of replacing the tracks and the property of the railroad company, if interfered with during the construction of the proposed improvement, in the same condition as found.

It is, therefore, my opinion as regards the claim referred to in your communication, that the cost of supporting the tracks, which was done in order that the railroad company could maintain its service, should be borne by the railroad company.

I would further suggest that the specifications, upon which bids are submitted in this class of improvements, should be so altered and amended as not to warrant the inclusion of

similar charges as part of the cost of such proposed improvements.

Very respectfully,

ROBERT REDFIELD,
Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JULY 29, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Referring to your recent communication wherein you ask if the continuous user by the public for a period of twenty-five years of a strip of land thirty (30) feet by forty-three and eighty-four hundredths (43 84-100) feet of part of lot ninety-seven (97), forming a continuation of Fair place, will confer an easement upon the public, making this strip a public way and rendering its obstruction a nuisance, I am of the opinion that this strip is a public street by prescription; provided continuous and uninterrupted user by the public for the statutory period of fifteen years can be shown. The authorities confirming this view are:

Lewiston v. Proctor, 27 Ill. 414;

Grune v. Nichols, 36 Ill. 92;

Dillon on Mun. Corp., Sec. 637;

Angell on Highways, Sec. 323.

The general rule is that to establish a road as a public highway by prescription there must have been the use of it by the public for twenty years (or as the law now is, for fifteen years), and such use must have been adverse, under claim of right, continuous, uninterrupted and with knowledge and acquiescence of the owner or owners of the land over which the easement is claimed.

2 Greenleaf on Evidence, Secs. 539, 539a.

Daniel v. People, 21 Ill. 438;

Manrose v. Parker, 90 Ill. 581;

City of Chicago v. C., R. I. & P. R. R. Co., 152 Ill. 561;

Township of Madison v. Gallagher, 189 Ill. 108.

Section 1 of the "Act in regard to roads and bridges in counties under Township Organization," etc., approved June 23, 1883, provided:

"That all roads in this State which have been laid out in pursuance of any law in this State, or of the territory of Illinois, or which have been established by dedication or used by the public as a highway for twenty years, and which have not been vacated in pursuance of law, are hereby declared to be public highways." (2 Starr & Curtis Stat., page 2134; 3 id., page 1112; Rev. Stat. of 1874, page 913.)

Said Section 1 was amended in 1897 by substituting fifteen years for twenty years. (3 Starr & Curtis Stat., page 3541.)

Assuming the statement of facts given by Ald. Dougherty to the Superintendent of Maps is correct, and can be fully substantiated, I am of the opinion that the public have prescriptive rights in the strip in question and the obstruction of the way by fencing in this strip constitutes a nuisance which may be abated by the Department of Public Works by serving a notice and order upon the persons who erected the fence to remove the same and in the event of their non-compliance with such order, causing its removal by the proper authority.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 29, 1903.

MR. JOHN ERICSON, City Engineer.

Dear Sir:

I have your communication of recent date, relative to the duty of the C. T. T. R. R. Co., the C. & N. W. R. R. Co. and the Pennsylvania R. R. Co. to repair the central roadway of Ogden avenue viaduct.

In the case of *City of Chicago v. C. & N. W. R. R. Co.*, Judge Chytraus rendered an opinion which is reported in the

Corporation Reporter for July 12, 1900, in which, after an exhaustive review of the authorities, he held that there was a well defined obligation at common law on the part of the railroad company to keep in repair the viaducts which span its tracks.

The companies in question apparently recognize and admit this liability, but seek to avoid the responsibility of keeping the central roadway in repair. Upon what theory they do so is not evident, as the central roadway is presumably as generally used by the public as the side roadways, the only difference being the restriction of the use of the central one to light traffic, which restriction can in no way affect the railroad companies. This municipality is strictly accountable to the public for the safe condition of its thoroughfares, and when a railroad company crosses any street it is compelled by the common law and by statute to restore such crossing to its former condition and maintain the crossing in a safe condition for those passing thereupon. When public necessity or convenience require the erection of viaducts over the tracks of railroads, the duty to maintain these more modern instrumentalities for public safety is in no manner changed. It is said in the case of *McFarlane v. City*, 185 Ill., on page 248:

"The ordinance says that the railroad company shall maintain and keep in repair the approaches, not some particular part thereof, but the *whole structure*."

So here the statutory liability to keep the crossing in repair I take to mean the whole crossing, or viaduct, and not merely two of the three driveways running thereon.

I am of the opinion that notice should be given to the companies in question to repair the central roadway and in the event of the disregard of such notice, the city may repair and recover the cost thereof from these corporations.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JULY 29, 1903.

MR. JOHN C. FETZER, 215 Dearborn St., Chicago.

Dear Sir:

Your recent favor requesting the Corporation Counsel to advise you where a hospital for infectious diseases could legally locate within the city limits, and what requirements by ordinance such a hospital would have to comply with, has been referred to me.

The location of such a hospital is regulated by the provisions of only two ordinances:

First. There is an ordinance prohibiting all hospitals erected or established after the passage of the ordinance, from locating "within four hundred feet of property used for school purposes." This ordinance would, of course, apply to hospitals for infectious or contagious diseases. It was passed on June 15, 1903, and appears on page 494 of the council proceedings of that date.

Second. There is in force another ordinance regulating by name, among other hospitals, the location of hospitals for contagious diseases. This ordinance prohibits the location of such hospitals "in any block in which two-thirds (2-3) of the buildings fronting on both sides of the street or streets on which the proposed hospital may front, are devoted to exclusive residence purposes . . . unless the owners of a majority of the frontage in such block, and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building faces, consent in writing to the building, constructing or maintaining, managing or conducting of any such hospital in said block." Such written consents are required to be filed with the Commissioner of Buildings and a copy thereof with the Commissioner of Health. This ordinance was passed on June 8, 1903, and appears on pp. 446-447 of the council proceedings of that date.

If the hospital in question does not locate within a residence district as above described, it may locate anywhere within the city limits without having to obtain frontage consents, and without any restriction by ordinance as to location,

except the one above referred to in respect to property used for school purposes.

There is a further ordinance containing general police regulations applying to all hospitals of every kind, which would, of course, include hospitals for infectious diseases, requiring hospitals to obtain from the Commissioner of Health, a permit, for which an application in writing containing certain data must be made; also requiring hospitals to pay a license fee of \$10; and further providing for sanitary inspection, revocation of license on certain conditions, mode of construction, monthly reports, etc., etc. This ordinance was passed on February 24, 1903, and appears on pp. 2173-2174 of the council proceedings of that date.

The ordinances above referred to (marked copies of which I herewith send you) comprise all of the municipal legislation on the special subject of hospitals.

It must not be understood, however, that a compliance with all of the provisions of these ordinances will protect a hospital from any suit at law or equity which may be brought by a private individual on the ground that he has sustained some special injury on account of the location or maintenance of the hospital. All that a compliance with the ordinances affords a hospital is protection from municipal interference.

I thought proper to call your attention to this fact as it is sometimes erroneously supposed that when a hospital complies with the ordinances, and obtains a permit from the city to conduct its business, that such compliance and permit would constitute a complete defense to a suit brought against the hospital by a private individual on account of management or maintenance of the hospital, which would be injurious or offensive to him.

If I have not given you all the information you may desire on this subject, or if I have not made the matter clear to you, please indicate what further you may wish.

Very truly yours,

FRANK JOHNSTON JR.,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 30, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen :

An order of your honorable body passed at the meeting of December 22, 1902, requested the opinion of the Corporation Counsel, in substance, if the city could compel the Chicago & Alton Railroad Company, the Atchison, Topeka & Santa Fe Railroad Company and the Chicago, Madison & Northern Railroad Company to light the subways from Halsted street west under the elevated tracks of these companies.

I assume that valid reasons of public safety exist creating the necessity for the lighting of the subways. There is no special agreement with any of the companies in question in the ordinances conferring upon them the right to cross the streets sought to be lighted, which puts upon any of them the burden of providing for the lighting. Section 1763, however, of the Revised Code of 1897, provides:

“All railroads whose track or tracks cross or intersect any of the streets within the limits of the City of Chicago above the level of such streets shall and they are hereby required to provide at their own expense proper and sufficient light and care for the same at all such crossings or intersections underneath the track or tracks of said railroad companies. Said lights shall be subject to the approval of the Commissioner of Public Works.”

These companies have a special use of the streets in passing over them, which, of course, the ordinary citizen has not. This special use creates a condition in the streets at the subways which is the immediate cause of the necessity for the lighting. This section of the code comes therefore clearly within the decision of the Supreme Court in the late case of *City of Chicago v. Union Traction Company*, 199 Ill. 259, in which the general ordinance requiring the removal of street accumulations from the street railway tracks by the companies operating those tracks was held valid. This was put upon the express ground that the Traction Company exercises a special privilege in the street and in the exercise of this privilege contributed to the unsanitary condition caused

by the street accumulations. There seems to be a clear analogy between the case just cited and that in regard to which the opinion of this department is asked. I am of the opinion that the ordinance in question is valid.

Yours respectfully,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 31, 1903.

MR. WALTER J. RAYMER,

Chairman Sub-Committee on Elevated Railroads
of Committee on Local Transportation.

Dear Sir:

In accordance with your request as Chairman of the Subcommittee on Elevated Railroads of the Committee on Local Transportation, I have prepared the amendments which you ask to have inserted in the proposed ordinance authorizing the Northwestern Elevated Railroad Company to extend its line of elevated railroad.

I think it advisable that certain comments should be made upon the ordinance, as it will stand with these amendments.

First. The ordinance recites that there has been presented to the City Council a petition of the owners of the land representing more than one-half the frontage, consenting to the construction, operation and maintenance of the elevated railroad upon the streets and highways of the city designated in the ordinance. These consents should be examined with a view to ascertaining whether they comply with the statute in the amount of frontage signed for and with reference to the rights of the persons signing to give such consents.

Second. The ordinance contains no provision specifying the kind of motive power by which the road is to be operated.

Third. There is no provision that the construction of

the company's railroad and its use and the appliances and apparatus connected therewith for the transaction of the company's business shall be subject to the reasonable rules and regulations applicable thereto of the department of the city, and to such special requirements of a reasonable nature as the City Council may from time to time prescribe.

Fourth. In the second paragraph of Section 1 describing the "Second Route" the right is given to construct the railroad "commencing at the terminus of of the route last above described; thence westerly, northwesterly, north or northerly to the city limits. The line of railroad authorized in this clause may be constructed as a surface line." The terminus of the first route here mentioned is a point between Lawrence avenue on the north, Montrose boulevard on the south, and between the right of way of the Chicago & Northwestern Railroad Company on the east and North Lincoln street on the west. From this point the railroad may go as it pleases to reach the city limits so long as the direction be "northerly" or "westerly." But "northerly" may include any direction toward the northeast, and "westerly" may include any direction toward the southwest. The grant, therefore, is one which authorizes the construction of a surface line anywhere in Chicago except in that part of the city lying within a line drawn directly east and one drawn directly south of the terminal point mentioned. I take it that such a grant is not intended to be made.

Moreover, as the ordinance does not, as I have pointed out, limit the motive power to be used, it may be considered a grant of power to operate a surface steam railroad in the greater part of the city.

More than this, inasmuch as Section 14, prohibiting the carriage of freight only applies to "said elevated railroad company authorized" and to "its line of railroad to which this is an extension", the ordinance would grant in the territory in question the right to maintain a surface line both for freight and passengers. The proposed ordinance was prepared by the counsel of the railroad company. No doubt the extent of the new grant was present to counsel's mind; but I understand that neither the purport of these provisions

nor the company's desire to obtain a concession of such magnitude was brought to the attention of the committee.

Fifth. In accordance with the request of the sub-committee I have prepared an amendment to Section 4, making the fare five cents within the city limits. I think, however, that the right should be reserved to the city to regulate from time to time the fare to be charged by the company. The regulation would, of course, have to be reasonable. In the draft submitted to the committee by the representative of the company, it is provided that "no more than five cents, which is hereby fixed as the rate of fare, shall be charged and collected," etc. No other elevated railroad has such a provision as the one just quoted. I think this may fairly be said to mean that not only no more than five cents may be charged as the rate of fare, but that five cents is so "fixed" as the rate of fare that the City Council could not reduce it below this point. It certainly could not have been the intention of the committee that any such provision should be contained in the ordinance in its final form.

Sixth. There are two provisions in Section 5 which demand attention. The company is declared to have the right to maintain on its own grounds its stations, ticket offices, waiting-rooms, etc., "and the right to construct and maintain covered passageways or connections between the interior of all such station buildings and the exterior platforms is hereby expressly granted to such company." What is sought here is the right to connect the platforms in public streets with the stations on private ground, whether on its own ground or that of others. It seems to me that this privilege should be granted only as the occasion may arise and not in the indefinite and general form which it takes here.

The bearing of another provision in the same section should be particularly noted. Some years ago attempts were made by the so-called "Union Loop" to connect its platforms with certain department stores. This was opposed by the city. The connections were, however, made without permits. It is perhaps not going too far to say that the connections were made without permits because they were made surreptitiously. Bills for injunction were filed to prevent

the city's interference with the work so done by Messrs. Schlesinger & Mayer, Rothschild & Co., and Siegel, Cooper & Co. Those suits are still pending. The city claims that the company has no right to make the connections. The proposed ordinance in Section 5 provides "the said company shall have permission and authority and the same are hereby given and granted to it to extend the platforms of all the stations on its line of railroad on Fifth avenue, Van Buren street, Wabash avenue and Lake street, commonly and formerly known as the Union Loop, so that the companies using the same may expeditiously receive and discharge passengers at such platforms. All ordinances in conflict with this last provision are hereby annulled so far as the same are inconsistent." Such a provision will put an end to the pending litigation and would waive every right in these three cases for which the city has contended.

Seventh. The city has consistently contended that an elevated railroad company may only use its stations so far as they are above the public streets for purposes directly connected with the operation of its railway. The companies have without any express authority from the city, used the available space on their platforms for advertising purposes. An opinion was given June 20, 1902, by this department to the effect that such use of the platform space is unauthorized. The proposed ordinance is silent in this particular. It might be well to insert a provision, conferring within reasonable bounds, this privilege upon the company, and providing for an adequate compensation to be paid the city out of the receipts of this part of the company's business.

Eighth. Section 7 provides that the authority granted is upon the express condition that that part of the railroad authorized by the first part of Section 1—the so-called "First route", shall be constructed before December 1, 1906, and that if not so constructed the rights granted to the company shall cease, except as to the portion constructed, and as to that portion, the ordinance shall remain in full force. The effect of this clause is perhaps more than appears on the surface. By Section 10 of the company's original ordinance of January 8, 1894, accepted January 15, 1894, it was provided that unless

the elevated railroad should be extended north from Wilson avenue to the city limits within ten years from the date of the acceptance, the rights and privileges granted the company as to the portion of the road not so constructed should cease. The ordinance continues—"the said company shall further pay into the treasury of the City of Chicago as liquidated damages for its failure to complete said road from Wilson avenue to the northern city limits the sum of twenty-five thousand dollars for every uncompleted mile of such road." This provision was left untouched in the company's amendatory ordinance of June 24, 1896, and in the agreement of July 1, 1895, relating to the last mentioned ordinance. The fourth clause of the agreement did, however, provide that "except as otherwise expressly provided by said amendatory ordinance of June 24, 1895, all the conditions, restrictions, obligations and limitations contained in said original ordinance of January 8, 1894, shall continue in full force and effect against said railroad company notwithstanding the passage of said amendatory ordinance, and shall likewise be applicable and operative against said railway company in respect to said amendatory ordinance and with like effect as if expressly set forth in said amendatory ordinance."

The ordinances of January 8, 1894, and June 24, 1895, were amended by an ordinance passed January 8, 1900. The time for the construction of the line from Wilson avenue north to the city limits was extended by Section 10 of the last mentioned ordinance to January 1, 1905, but the company in the event of its failure to construct its extension was still made liable to pay to the city as liquidated damages twenty-five thousand dollars for every uncompleted mile of road. By Section 9 of the proposed ordinance the construction and putting in operation of the line of railroad authorized under the first clause of Section 1 of the proposed ordinance is made to release and discharge the company "from the provisions in the ordinance of January 8, 1894, as amended by the ordinance of January 28, 1900, and in Section 10 of the last named ordinance, from the payment into the treasury of the City of Chicago of the sum of twenty-five thousand dollars for each uncompleted mile of railroad referred to in said

Section 10 of the ordinance of January 8, 1900." The line of railroad authorized by the first clause of Section 1 of the proposed ordinance carries the road about a mile west on Graceland avenue; thence north for about one-half mile; thence west a distance of one mile to a point near Western avenue. This route is not an extension of the present line of railroad. It is no more than a western feeder. The line of railroad authorized by the former ordinances, upon the non-completion of which hangs the forfeiture of twenty-five thousand dollars a mile, would be about four miles long. The building of a feeder for the main line already in operation has no connection with the forfeiture clause for non-completion of the extension of the main line. The company is still bound to build the main line before the time fixed in the ordinance of January 8, 1900. It is hard to believe that the company seriously expected the city, except by inadvertence, to waive without any return the provision as to the forfeiture of twenty-five thousand dollars for each uncompleted mile.

Ninth. Another suggestion I wish to make seems of great importance: At the time of the passage of the original Northwestern ordinance it was for many reasons justly considered inadequate. In the points open to criticism no change was made by the amendatory ordinance of June 24, 1895. On the date of the next council meeting after June 24, 1895, in consideration of the approval by the then Mayor, of the amendatory ordinance, an agreement was entered into by the Northwestern Elevated Railroad Company, the terms of which may be considered, so far as they go, an improvement upon both the original and the amendatory ordinances. Very much the same course was subsequently taken in the case of the ordinance of the Union Elevated Railroad Company, which was passed October 14, 1895, and that of the Union Consolidated Elevated Railway Company, passed June 29, 1896. It is a matter of history that these ordinances were, as passed, unsatisfactory. When the latter ordinance was passed, instead of vetoing it outright, or with suggestions that the vote by which the ordinance was passed be reconsidered, and the ordinance repassed with certain amendments, the then Mayor chose the course of presenting to the council at its next meeting a con-

tract executed by both the Union Elevated Railroad Company and the Union Consolidated Elevated Railway Company, agreeing, in consideration of the Mayor's approval of the ordinance, to the greater part of the amendment to the two ordinances which the public at large and more than a third of the council demanded. These agreements, both of the Northwestern Company and the Loop Companies, were not executed on their face by the City of Chicago, nor was their execution by any city official authorized. In fact they do not purport to be executed by the city or by any city official on the city's behalf. The city has, however, always contended and now contends that these contracts were and are valid and that their provisions were and are binding upon the respective companies as a matter of law. As a matter of good morals the validity of the agreements is not open to discussion. The ordinance under which these companies operate became a law only because the companies in their own names and by their proper officers executed these agreements. The companies, however, on the first opportunity repudiated the agreements. They have not paid the compensation required in the agreements except under protest. They have taken the position throughout that the agreements are not valid for the reason that their execution by the city was not authorized, and for the further reason that the consideration of the then Mayor's not withholding his approval from the ordinance was not a legal consideration. The companies and their representatives, so far as I know, have not entered into any discussion of the subject from the standpoint of good morals or fair dealing. This being so, the city would doubtless be justified in dealing with the companies upon a basis of the strict rights of the parties. The Northwestern Company now seeks an extension ordinance varying in terms from its former ordinance. The company's relations with the city, by reason of the ordinance and contracts mentioned, are in an unsatisfactory condition. An easy opportunity now is given for the city to obtain a rectification of these relations. Appropriate clauses might well be introduced into the proposed ordinance embodying the terms of the two contracts. It would hardly do for the Northwestern Elevated Railroad Company to say that in the

proposed ordinance it is not concerned with the contract relating to the Union Loop Companies, for, as pointed out before, the proposed ordinance already deals with the question of the Union Loop platform extensions. The way has therefore been blazed by the company for the amelioration of the relations between the company and the city. Moreover, in Section 5 the loop line is referred to as belonging to the Northwestern Company. I am informed that all the property of the so-called loop has been purchased by the Northwestern Company and is now operated by it. There could therefore be no better time to do away with whatever ambiguity or doubt may exist in regard to the two agreements to which I have referred.

In your communication you ask that an entirely new ordinance be drawn embodying the amendments which you desired should be made. It has been thought best not to do this until the committee has passed upon the suggestions for additional amendments made in this opinion.

Very truly yours,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 31, 1903.

JOHN A. MAY, Esq., Secretary Board of Local Improvements.

Dear Sir:

In answer to your favor of the 30th inst., in which you request that directions be given as to "the application of the new law in the filing of the reports in the courts for the completion of the work," I beg leave to reply that I have had several conversations with Mr. Sullivan in this regard and a request from him as to my interpretation of Sections 61 and 84 of the Local Improvements Act. Mr. Sullivan requests information on the following points:

First. Whether or not Section 61, which reads as follows, is mandatory:

"Within thirty days after the filing of the report of the

amount and date of the first voucher issued on account of work . . . the clerk of the court in which such judgment is rendered shall certify the assessment roll and judgment to the officer of such city . . .”

In answer to this query, I beg leave to reply, it is my opinion that taking this section in connection with Section 84, which reads as follows:

“ . . . the intention and meaning hereof being that no property owner shall be required to pay to the collector a greater amount than his proportionate share of the cost of such work and the interest that may accrue thereon,” the word “shall” in Section 61 should be construed as meaning “may” and this section should not be considered as “mandatory” in all cases wherein it is apparent, the work not being completed, that there may be a reduction of the assessment. Should the other interpretation be given and it be considered as mandatory, one of the very objects of the new amendments, to-wit, the abolishment of the necessity of rebates, would be frustrated, as an assessment may be certified against a lot for one hundred dollars and after the completion of the work it be found out that the assessment was but seventy-five dollars. However, if the administrative conditions make it possible, it should be the duty of the department to see that all rolls are certified in accordance with Section 61 within the thirty days, except in such a case as above specified.

Second. In answer to query two, whether or not Section 84, which reads as follows:

“Within thirty days after the final completion and acceptance of the work . . . the Board of Local Improvements shall cause the cost thereof to be certified to the court . . . ,”

should be strictly followed, it is my opinion that it should be, in view of the fact that this is a preliminary step, taken previous to the hearing by the court to determine the truthfulness of the report and statement. If this statute was not strictly followed and the report was not filed as directed by this section, a question might arise as to the jurisdictional steps taken previous to the adjudication as to the correctness of the report referred to above.

Third. In answer to the query as to whether in a case wherein the work is completed by or before July 1, 1903, when the new amendments went into effect but yet where the final accounting had not been filed, it was necessary to follow the provisions of Section 84, as amended, or whether the provisions of the old law should be followed, it is clearly my opinion in view of recent decisions of the Supreme Court, this being a matter of procedure, that the law in force at the time the act is to be done, is to be complied with. Therefore, these proceedings should be carried on under the provisions of the new amendments. - (*C. & W. I. R. R. v. Guthrie*, 192 Ill. 579.)

Fourth. In answer to the query as to whether or not under Section 84 of the new law it is necessary, in a case where the assessment is not divided into installments, "for the Board of Local Improvements to state in the said certificate whether or not said improvement conforms substantially to the requirements of the original ordinance for the construction of the improvement, and to make an application to said court to consider and determine whether or not the facts stated in said certificate are true and to fix a time and place for such hearing," it is my opinion that under these conditions (that is, improvements which are not divided into installments), this section does not apply.

Very respectfully,

WM. M. PINDELL,

Asst. Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 4, 1903.

MR. EDWARD M. LAHIFF, City Collector.

Dear Sir:

In your favor of the 3d inst., you inquire whether or not in the case of the issuance of a dram shop license to a club a bond may legally be taken from the applicant differing in form from that in use in the ordinary case.

In reply I beg leave to say that the recent decision of the Supreme Court construing the Dram Shop Act (Hurd's Stat-

utes, 1901, p. 750) in the *People v. Law and Order Club*, 203 Ill. 137, makes no distinction between one dram shop license and another. Under this decision a club in which liquor is sold to the members is a dram shop within the meaning of the statute. So far as possible, therefore, the same form of application and bond should be used for licensees. Certain provisions applicable to an individual might, in the nature of things, not be applicable to a corporation. For instance Section 1176 of the Revised Code of 1897, requires, as part of the contents of an application for a license to keep a dram shop, an agreement that during the term of the license no intoxicating liquors shall be sold in the dram shop "by any female, unless such female be the applicant or be the wife of the applicant, or be related to such applicant by consanguinity or affinity and then and there residing with such applicant as part of his or her family." Where an incorporated club is the applicant that part of the statement not applicable should be stricken out. In such case the ordinance would be sufficiently complied with by a statement that liquor would not be served or sold in such dram shop by any woman.

You also desire an opinion whether the provisions of the city ordinance in regard to the issuance of licenses for the sale of cigarettes and the keeping of billiard and pool tables apply to clubs where cigarettes are sold or a charge is made for the use of billiard or pool tables.

The cigarette ordinance of July 6, 1899, forbids the sale of cigarettes without a license of \$100 per annum, Section 158 of the Code of 1897, forbids the keeping for profit "of any billiard or pool table, pin alley, ball alley or shooting gallery without first obtaining a license therefor." The license is issued under Section 159 "at the rate of \$10 for each billiard or pool table, pin alley, ball alley or shooting gallery." No license is required "from persons keeping or running billiard or pool tables without charge for the use of same."

The reasoning of the court in the *People v. Law and Order Club*, cited above, as to the sale of intoxicating liquors by clubs has a similar application to the sale of cigarettes and the keeping for profit of billiard or pool tables. Under this decision a club in order legally to receive money from its

members for cigarettes or for the use of billiard or pool tables must obtain the appropriate license from the city.

Very respectfully yours,

COLIN C. H. FYFFE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 4, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Answering your letter of inquiry dated July 24, 1903, as to whether or not there is any legal objection to granting a permit to the Michigan Central Railroad Company to replace water pipe on Kensington avenue from Calumet Lake to its right of way, I beg leave to say: It appears that on September 21, 1877, an agreement was made between the then owner of the land in question and the Michigan Central Railroad Company, by which said company was granted the right to lay and maintain said water pipe and to change the size thereof and relay the same. On said day it appears from the records of the Map Department that the street in question had never been dedicated as a public street. If, therefore, this agreement was entered into before the title of the city vested in said land as a public street, the city took its right subject to the easement with which the land was burdened, and there is no legal objection to the issuance of the permit. It is only in the case of a street duly dedicated prior to the attaching of such easement that the city can withhold its consent to the enjoyment of the easement.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 5, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Answering your letter of August 4th (your No. 726), trans-

mitting voucher prepared by the Board of Education for the payment of certain special assessments against Board of Education property; also a letter from the Secretary and Auditor of said Board notifying you that the Board has reconsidered its action in ordering the payment and asking that the voucher be returned, I beg leave to say:

In my opinion you should not return this voucher to the Board of Education. It is dated July 22d, 1903, and when received by you operated to transfer the sum of money therein named from the school tax fund to the various special assessment funds described in the certificates of sale referred to in said warrant of the Board of Education and the correspondence regarding the same subject matter. The question of whether or not the entries have been made upon the city's books of the transfers in question is immaterial; that is a mere question of bookkeeping, and the beneficiaries in said funds (the holders of the bonds and vouchers) have the right to insist that the money thus transferred be used in payment of the liabilities against the said funds. I recommend that you proceed to use the money for the purposes for which it was transferred to you, until and unless you are prevented from such use of the money by process of court.

I return herewith voucher and letter referred to above.

Yours very sincerely,

EDGAR B. TOLMAN,
Corporation Counsel.

AUGUST 5, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Replying to a communication from Mr. Hubbell, Deputy Comptroller, requesting an opinion on the liability of the city for injuries sustained by one John Reilly, an employe of L. P. Friestedt & Co., who was injured while employed in the construction of a cell house at the Chicago House of Correction, I beg leave to submit the following:

I assume Reilly was injured through the negligence of Friestedt; in order to determine whether or not the city is

liable for such negligence, it is necessary to determine whether Friestedt was a servant or employe of the city or whether he was an independent contractor. It appears that Friestedt was to furnish the mechanical help required at current rates of wages, and to furnish the building appliances and do the engineering and superintending of the work and receive therefor ten per cent on such labor as was required. He was to use the labor of prisoners so far as possible in prosecuting the work.

The principle that distinguishes a servant from an independent contractor is well settled and generally recognized, but its application is not always easy. It has been said that "an independent contractor is one who renders service in the course of an occupation representing the will of the employer only as to the result of the work, but not as to the means by which it is accomplished."

14 Amer. & Eng. Ency. of Law, 829.

The following cases wherein it was held that the party guilty of negligence was an independent contractor and not a servant are instructive:

A master stevedore who used a steam winch furnished by the vessel he was unloading, and who employed one of its crew.

Murray v. Currie, L. R. 6, C. P. 24.

One who was employed to build a dam for a specified sum per day for himself and each of his men, the company furnishing blasting powder and superintending the building of the dam.

Corbin v. American Mills Co., 272, 274.

One who was employed to sink a shaft, the employer furnishing power and an engineer.

Rourke v. Colliery Company, 1 C. P. Division, 556.

One who was employed by a railway company to furnish and superintend a steam engine to pump water.

Railroad Company v. Farver, 111 Ind. 195.

One who contracted with a railway company to finish the uncompleted job of another contractor, and to be paid for it for labor and material furnished by him, and ten per cent additional.

Railroad Company v. Reese, 61 Miss., 581

The operator of a shingle machine for a stated sum per thousand shingles.

State v. Emerson, 455.

One who contracts to dig a ditch and lay pipe, the employer furnishing the pipe and boxing, but to have no other connection with the work.

Smith v. Simmons, 103 Pa. St., 32.

It is immaterial that the work was to be paid for by the day.

Hexamer v. Webb, 54 Am. Repts., 703;

Fink v. Furnace Company, *supra*.

Corbin v. Mills, 27 Conn., 274.

Or that the work must be done to the satisfaction of the employer's superintendent.

Chambers v. O. L. J. & T. Company, 1 Dis. 329.

Or that the employer retains the power to discharge incompetent workmen of the contractor.

Reedie v. Railway Company, 4 Exchequer, 244.

Or that work must be done according to specifications.

Hunt v. Railroad Company, 41 Pa. St., 475;

Railroad Company v. Willis, 38 Kansas, 330;

Or that the mere right to supervise the work is retained by the employer.

Eaton v. Railroad Company, 59 Maine, 20;

Schular v. Railroad Company, 38 Barb., 653;

Callahan v. Railroad Company, 23 Ia., 562.

Or that the city's engineer shall have power to direct certain changes in the time and manner of doing the work.

Erie v. Caulkins, 85 Pa. St., 247.

It has been held that where a railway company furnishes a contractor with engines and trains and men to operate them, the company is not liable for the negligence of such men.

Miller v. Railroad Company, 76 Ia., 655;

Hitte v. Railroad Company, 19 Nebraska, 620.

On the other hand there are decisions apparently in conflict with those already cited; thus it has been held that

"One who contracted with a railway company to take entire charge, in its yards, of the work of making up freight trains; to be paid a certain sum per ton of freight, and for

each car hauled out of the yards; to employ and pay all men necessary in the work; and to do the work to the satisfaction of the company's superintendent, who might, if not satisfied, terminate the arrangement on twenty-four hours' notice, was a servant, and not an independent contractor."

Speed v. R. R. Co., 71 Mo., 303.

One who delivered fuel, at a certain price per load, was held a servant.

Waters v. Fuel Co., 52 Minn., 474.

Likewise, one who moved cars, on its tracks, for a railway company, by horse power, employing and paying drivers and teams.

R. R. Co. v. Hahn, 12 Atl., 479.

It is believed, however, that the weight of authority sustains the view that in this case, Friestedt was an independent contractor.

There can be no presumption, from the employment of Friestedt alone, that he was a servant, since he may as well have been a contractor; hence, recourse must be had to other facts and circumstances bearing upon it. As will be seen from the authorities cited, a servant is subject to the control of the master in respect to the time, manner, means, instruments, and other details of the work. A contractor, on the other hand, is defined to be "one who follows a regular independent employment, in the course of which he offers his services to the public, to accept orders and execute commissions for all who may employ him in a certain line of work, using his own means for the purpose, and being accountable for final performance."

Here Friestedt was to furnish the mechanical help required, also building appliance, and *was to do the engineering and superintending*. The only part the city had in the work was the furnishing of prisoners to perform a portion of the labor. It does not appear that Friestedt was subject to any control as to means or methods of doing the work, but, on the contrary, he himself was to do the engineering and superintending. He was regularly engaged in that line of business, and ready to accept and execute commissions from all who chose to employ him.

For the reasons indicated I am of the opinion that in this case the L. P. Friestedt Company was an independent contractor, for whose negligence the city would not be liable, and that the city is not liable to John Reilly for the injury sustained by him.

In a separate communication, I give you an opinion on the question of whether or not the House of Correction is required to let work amounting to five hundred dollars or more by contract to the lowest bidder.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

AUGUST 5, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I acknowledge receipt of your letter of the 7th inst. with letters from the General Superintendent of the Northwestern Elevated Railroad Company in regard to the building to be erected at the southeast corner of Van Buren and Clark streets, and the probable effect on the street and the structure of the elevated railroad by the excavation now being made for this building, the elevated railroad company claiming that by reason of this excavation the foundations of its structure will be damaged.

I am of the opinion that in excavations of this kind the city may interfere if such excavations will cause the street, as such, to settle, no matter whether or not there is a superincumbent weight upon the natural surface of the street itself. If this excavation is such as to endanger the street as a street, without any regard to the elevated railway structure thereon, you have the power to require such person to preserve the street. If, however, the excavation is being conducted with ordinary care and skill so that it would not endanger the street if the elevated railroad structure were not on it, and would support the weight of the street itself as now constructed, and the danger is caused only from the superimposed weight

of the elevated railway structure, then it is the duty of the Northwestern Elevated Railroad Company to protect its own property.

18 Am. & Eng. Ency. of Law, 544.

Very truly yours,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 6, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

My attention has been called to a practice in regard to the payment of jurors by the Prosecuting Attorney, which in my opinion is open to objection.

It seems that the Prosecuting Attorney pays the jurors and takes an assignment of their certificates, said certificates being signed by the respective justices. In my opinion there is an impropriety in having any dealings between a law officer and a juror, even although subsequent to the conclusion of the case.

The Prosecuting Attorney ought, in my opinion, to pay the Justice of the Peace when the jury is called, the statutory fee of \$3, being 50 cents for each juror, and take the receipt of the justice. The disbursement of the money to the jury should be made by the justice.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 12, 1903.

MR. W. F. BRENNAN, Deputy Commissioner of Public Works.

Dear Sir:

Referring to your communication of recent date requesting a legal interpretation of certain portions of Section 269 of the Revised Code of Chicago (1897), I beg leave to say that said section contains the following:

"Any person desiring to move a building shall first ob-

tain the written consent of the owners of a majority of the lots fronting on the same side of the street of the block in which it is proposed to lay such removed building."

The first question presented is: Does this require the written consent of the owners of a majority of the lots fronting on the same side of the same street between the nearest cross streets on each side, or does it require the consent of the owners of a majority of all the lots in the whole block, using the term "block" to represent the quadrangle bounded by the street in question, the nearest cross streets on either side and the nearest parallel street in rear of the proposed location?

A similar question arose in the construction of the dram shop ordinance, which provided that the "application shall be signed by a majority of the property owners, according to frontage, on both sides of the street, in the block in which the dram shop is to be kept."

The Supreme Court held (*Harrison v People*, 195 Ill., 466) that the word "block" meant the entire quadrangle bounded by the four nearest streets, and that the consent required was of a majority of the owners of property fronting upon both sides of each of the four streets surrounding the block. The reasoning upon which that decision is based is, that a dram shop is a nuisance and could not lawfully be maintained without the permission of the City Council in the manner provided by law; that its deleterious effect was not limited to the street upon which it fronted, but by its contiguity affected or might affect injuriously all the property in the entire square, and that the word "block" would accordingly be construed to mean the entire square bounded by the nearest four streets."¹

"5. Ordinance construed as to meaning of word 'block.'

"The word 'block', used in an ordinance making it unlawful to locate or maintain on any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes any building for a blacksmith shop without the written consent of a majority of the property owners, will be construed to mean 'street'; where the ordinance provides that in determining whether two-thirds of the buildings on both sides of the street are used for residence purposes any building fronting upon another street and located on a corner lot shall not be considered. (*Harrison v. People*, 195 Ill. 466, distinguished.)"

Patterson v. Johnson, 214 Ill., p. 481.

The only difference between the language of the dram shop ordinance and that of the ordinance under consideration is that the dram shop ordinance says: "on both sides of the street in the block", while the ordinance in question says, "on the same side of the street of the block."

If this matter should be presented to the Supreme Court, it may be that that court would distinguish between the terms used in these two ordinances, and hold what the writer of this opinion would hold but for the decision of the Supreme Court in the dram shop case above referred to, that the words on the "same side of the street in the block" mean the same side of the same street on which the removed building will front and within the two nearest cross streets on either side. In view of this decision, however, and in view of the fact that the ordinance is intended for protection from danger of conflagrations spreading to other property from frame buildings so removed, and that the danger of fire in such case is limited not by frontage, but by contiguity, and may extend to the whole square in which the frame building may be located, I am forced to the conclusion that a proper respect for the decisions of the Supreme Court compels the adoption in this case of the construction to which that court has given utterance in the *Harrison case, supra*. You should therefore require the consent in writing of the owners of a majority of the property fronting upon the same side of each of the four streets bounding the square in which the proposed frame building is to be situated after its removal.

The said ordinance also contains a requirement of the written consent of "a majority of persons owning the frontage opposite the proposed location and within one hundred and fifty feet of the same." This latter requirement I construe to mean the written consent of the owner or owners of the land which is directly opposite the proposed location of the building and which is also within one hundred and fifty feet of the same. The consent of these owners of three hundred feet frontage opposite the proposed location might necessitate the inclusion of property in three different blocks, if the proposed location were on or near any corner.

If the proposed location is on a corner lot, I am of the

opinion that this corner lot should be treated as having two frontages, and that similar consents are required of the owners of frontage on the opposite side of each of the streets upon which the corner lot abuts.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

AUGUST 12, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

In reply to your request of recent date for an opinion as to whether a Justice of the Peace exhausts his authority when he holds a defendant to the Grand Jury and has no power to take the recognizance of the defendant to appear in the Criminal Court, I beg leave to say:

Section 363, Chap. 38, Hurd's R. S. of Ill (1901), under title, "Bail or Commitment", provides: "If it appears that an offense has been committed, and that there is probable cause to believe the prisoner guilty, and if the offense is bailable by the judge or justice of the peace, and the prisoner offers sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail is offered, or the offense is not bailable by the judge or justice, the prisoner shall be committed to jail for trial."

Section 367, under the title "Mittimus", provides: "When an offender or witness is committed because he fails to enter into recognizance as required by law, or because the offense is not bailable, the judge or justice of the peace shall make out his warrant or commitment, directed to the sheriff, coroner or any constable, and containing a short recital of the cause of commitment, and commanding the officer to commit the prisoner to the county jail."

In my opinion both of the foregoing sections contemplate that the Justice of the Peace has the power to take the recognizance after he has satisfied himself that there is sufficient evidence of the guilt of the defendant. In arriving at this opinion I am strongly influenced by the wording of Section 367, where it is stated, "When an offender is committed because he fails to enter into recognizance," etc. This can only

be construed to mean that if he had entered into recognizance before the Justice of the Peace he would not be committed to jail.

In *Johnston v. People*, 31 Ill., 469, a party having been examined upon a charge of larceny before a Justice of the Peace, was required to enter into a recognizance for his appearance at the next term of the Circuit Court; failing to comply with this requirement, he was committed to jail. Four days afterwards, the committing magistrate, alone, took the recognizance of the prisoner, and the recognizance was held to be valid.

This was a scire facias upon a recognizance taken before a Justice of the Peace, and duly certified to the Circuit Court of Jo Daviess County. The condition of the recognizance recited that the prisoner was brought before the Justice of the Peace who took the recognizance.

The court held that this gave the justice jurisdiction to hear the charge and admit the party to bail, even after the offender had already been confined four days in jail on the commitment of the same justice.

This would indicate that the justice does not exhaust his authority when he holds the defendant to the Grand Jury or the Criminal Court.

Respectfully submitted,

DAVID R. LEVY,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 12, 1903.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

In reply to your request of recent date, asking an opinion as to whether defendants held in the Criminal Court are beyond the jurisdiction of the police magistrate or justice of the peace in the matter of giving bonds after mittimus has been made out for the commitment of the prisoner to the county jail, I attach hereto a copy of an opinion rendered on

this same subject a few days ago, addressed to Mr. McGann, the City Comptroller.

Your request, however, raises an additional question to the one submitted by Mr. McGann, namely, the power of justices other than the one committing the prisoner, to accept recognizance and discharge the prisoner.

In my opinion the sections of the statute quoted in the attached opinion can only be construed to mean the justice who committed the prisoner and no other. If the statute intended that it should be any justice it would have so stated, but on the contrary it states specifically "the judge or justice."

In the case of *Johnston v. People*, quoted in attached opinion, it is true the court held that the justice could take the recognizance even after the prisoner had been four days in jail under the commitment, but stress is laid upon the fact that he was brought before the same justice who committed him. I am satisfied that if the recognizance had been taken by any other justice than the one who committed him the recognizance would not have been held to be valid.

Section 299 of Division III. of the Criminal Code, under the heading, "Recognizance of Prisoner in Vacation", provides: "When any person shall be committed to jail on a criminal charge, for want of sufficient bail . . . any judge or any two justices of the peace may take such bail or recognizance in vacation, and may discharge the prisoner from his imprisonment."

Section 331 of Division V., where a person has been held under peace bonds, and for failure to provide such bonds, has been committed to jail, under the heading, "Discharge or Recognizance After Commitment", provides: "A person committed for not finding sureties, or refusing to recognize as required by the court or magistrate, may be discharged by *any judge or justice* of the peace of the county on giving such security as was required."

If it is the law that a person can be discharged for any bailable offense by giving bail before any justice it would seem that there is no necessity for the two foregoing specific provisions. In fact, it seems clear that it was intended that

in vacation, in the probable absence of the committing magistrate, an added safeguard was provided against the very practice you complain of, by providing that such recognizance can only be taken by two justices.

I am, therefore, of opinion that after the prisoner is held to the Grand Jury or the Criminal Court the recognizance can only be taken by the justice who committed the prisoner and issued the mittimus.

Respectfully submitted,

DAVID R. LEVY,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

AUGUST 13, 1903.

H. C. BIRD, Esq., City Paymaster.

Dear Sir:

Referring to your several favors of recent date in regard to a claim made by F. Whitfield, an assignee of a fund due from the city to Patrick and John Mulcare for teaming from July 1 to July 15, I would say that I am of the opinion that the assignments are without effect to supersede or set aside any mechanic's lien upon the funds in the hands of the city, nor do I think the fact that these assignments were presented to the proper officer of the city prior to service upon the city of any notice of lien can affect the question so long as the city had not actually paid over to the Mulcares the amount of money due them.

Beardsly v. Brown, 71 Ill. App. 199;

Young v. Jones, 180 Ill. 216;

Spalding Lumber Co. v. Brown, 171 Ill., 487.

On the other hand, if the present case is not one that comes within the statute, and therefore there is no lien, there is no reason, these assignments being valid, why the money should not be paid to the assignee.

I understand that Mr. Whitfield's contention is that because the Mulcares were paid by the day they cannot be said to be contractors and within the view of the statute.

Section 38 of Hurd's Revised Statutes, which is the particular section in question, is very broad, and I think does not justify any such contention. At least, I find no authorities bearing it out; but I do not believe that the mere collection of garbage in the streets or alleys of the city constitutes a public improvement under the statute. A public improvement conveys the idea of something of a permanent nature; but it is to be remembered that the lien in this case attaches not to the improvement but to the funds in the hands of the city, and I am unable to find any authorities covering this precise question, Section 38 of the statute being a comparatively new enactment.

In your letter of the 10th inst. you suggest that this question is likely to arise again. That being so, my conclusion is that the safest course for the city is to decline to make any payment, but suggest to the parties claiming a lien that they file a bill in chancery against the city under the authority of *West Park Commissioners v. Granite Company*, 200 Ill., 527. That case decided that the city could not escape liability for the amount of a lien by ignoring a notice from a sub-contractor and making payment to the contractor or any other party; for although the statute provides no remedy against the city, equity will furnish one.

I would recommend, as an alternative suggestion, that, if you prefer, you turn over to Mr. Whitfield the amount claimed by him under his assignments upon his giving you a bond in double the amount of his claim, with approved sureties, providing that he will pay any judgment and costs that may be rendered against the city in favor of the parties claiming liens.

I return herewith the affidavit and notice of lien.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

COLIN C. H. FYFFE,

Acting Corporation Counsel.

AUGUST 15, 1903.

MR. E. M. LAHIFF, City Collector.

Dear Sir:

I beg leave to acknowledge receipt of your favor of the 3d inst., in which you desire to be informed whether the distance of saloons and dram shops from the Northwestern University at Evanston under the terms of the university's charter should be measured along a straight line or by the nearest traveled road.

The charter of the Northwestern University was granted by the Act of January 28th, 1851. This Act was amended by the Act of February 14th, 1855, which contains the following provision in Section 2:

"No spirituous, vinous or fermented liquor shall be sold, under license or otherwise, within four miles of the location of said university, except for medicinal, mechanical or sacramental purposes, under the penalty of \$25 for each offense, to be recovered before any justice of the peace in said county, in an action for debt, in the name of the County of Cook; Provided, That so much of this Act as relates to the sale of intoxicating drink within four miles may be repealed by the General Assembly whenever they think proper."

The question involves the interpretation of the words "within four miles of the location of said university." No indication whatever is given, beyond these words, of the mode of measurement intended to be applied by the Legislature. Similar provisions in statutes and in contracts have been often construed by the courts, both of England and the United States. I find upon examination of these cases that the courts have uniformly held that wherever a certain distance is indicated without any direction as to its ascertainment, the distance must be measured upon a straight line between the two points. I think the matter is of sufficient importance to warrant me in discussing to some extent these authorities.

All the English cases up to 1872 are discussed in the opinion of Mr. Justice Blackburn in *Mouflet v. Cole*, L. R. Exch., 32. This was a case of the construction of a covenant in a deed. The defendant in a deed conveying to the plaintiff a public house, covenanted that he would not be in any way

concerned in a public house "within the distance of one-half of a mile of the said premises called the 'Lord Holland' ", during the plaintiff's occupancy. On the trial it appeared that the defendant occupied a public house at a distance from the "Lord Holland" more than one-half mile if measured by the nearest traveled road and less if "measured as the crow flies", the expression used by the court. Mr. Justice Blackburn held that: "The parties to such an agreement do not contemplate the actual distance which a customer would have to traverse in going from one house to the other. No doubt, their first object was to have protection for the custom of the purchased house by securing that the seller should not set up business so near to it as to affect the custom, and that would involve the consideration of how far the customers would have to travel; but as a covenant to that effect would obviously lead to the litigation, they wish those who prepare their contract to lay down a fixed rule that will admit of no dispute. The words which they used are to be construed in their ordinary sense, bearing in mind that such is their object. That object is best effected by measurement on the map."

In *Jewel v. Stead*, 6 Ellis and Blackburn, 350, certain trustees were authorized by a turnpike act to erect toll gates, but not "within three miles of Bar Gate." Lord Campbell said:

"I am of the opinion that the mode of measurement in this case is along the straight line on the horizontal plane . . . unless there appear in the act a clear indication that there was a contrary intention, this mode of measurement should be adopted."

In *Lake v. Butler*, 5 Ellis and Blackburn, 92, Lord Campbell gave one of the chief reasons of convenience which make for the measurement along a straight line rather than by the nearest traveled road; he said:

"Now, if the distance is to be measured by the nearest practicable way, see how uncertain it is. The nearest mode of access may be by boat, by a route varying every day according to the state of the tide; or, if it be by land, it may be rendered longer or shorter by changes in the road; but if the straight line measurement be adopted, there can be no uncer-

tainty. Even where there are mountains to be ascended and descended, it is easy for a surveyor to ascertain the distance from point to point."

Similar suggestions are made by Erle J. in the same case. He said:

"I have no doubt the straight line is far more easily ascertainable, even if minute accuracy is required, than the nearest practicable road. Does that mean a foot-way or a carriage-way, or if a foot-way will not do, will a bridle path? In an aquatic country, are we to take a boat? All these are questions of doubt avoided by the simple rule now adopted."

In *Commonwealth v. Jones*, 142 Mass., 573, the statute provided that no license should be granted for the sale of intoxicating liquors in any building on the same street within four hundred feet of any building occupied by a public school. It was held that the distance between the school house and the building must be determined by measuring the nearest point of each house to the other.

To the same effect are the following cases:

Regina v. Saffron Walden, 9 Adolphus and Ellis, N. S. 76.

Dingman v. Walker, 28 L. J. Chancery, 867.

Love v. Porter, 93 Ala., 384.

In re the Liquor Locations, 13 R. R. 733.

State v. Greenway, 92 Iowa, 472.

Butler v. The State, 89 Ga., 821.

I consider that these cases take the true view and are supported by the right method of statutory interpretation. No other mode of measurement will be found to be necessarily permanent in its results.

I am therefore of the opinion that the statute incorporating the Northwestern University, as amended by the act of 1855, prohibits the sale of liquor at any place within a distance from the University of four miles, measured in a straight line.

Very truly yours,

COLIN C. H. FYFFE,
Acting Corporation Counsel.

AUGUST 22, 1903.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

I have your communication of this date requesting an opinion interpreting Section 6 of the act to amend Sections 1, 2, 3, 4, 6, 9, 10 and 11 of an act entitled "An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities, villages, and incorporated towns," approved April 29, 1887, in force July 1, 1887, as amended by an act approved April 24, 1889, in force July 1, 1889, as amended by an act approved May 11, 1901, in force July 1, 1901, with reference to the power of the city clerk to increase certain pension allowances in favor of beneficiaries under Section 6 of this act. Section 6 of the act of 1903, above referred to, is as follows:

"Whenever any member of the police force of such city, village or town shall lose his life while in the performance of his duty, or receive injuries from which he shall thereafter die, leaving a widow or child or children under the age of sixteen years, then upon satisfactory proof of such facts made to it, such board shall order and direct that a yearly pension of one-half the salary received by said member, not to exceed \$900 and the minimum not less than \$600 per year, shall be paid to such widow during her life, or if no widow, then to such child or children until they shall be sixteen years of age; PROVIDED, if such widow, child or children, shall marry, then such person so marrying shall thereafter receive no further pension from said funds: AND, PROVIDED FURTHER, that whenever any member of the police force of such city, village or town, has been retired after twenty years' service, or physically disabled, shall then marry, such wife or child or children of such marriage shall, after his death, receive no pension from said fund. Whenever any member of the police force shall die after ten years' service therein, and while still in the service of such city, village or town, as such policeman, leaving a widow or child or children under the age of sixteen years, then upon a satisfactory proof of such facts made to it, said board shall order and direct that a pension of one-half the salary, not exceeding the sum of \$900, shall

be paid to such widow, or if there be no widow, then to such child or children until they shall be sixteen years of age, said pension to cease upon marriage, as provided above.”

Proceeding to the question of the authority of the city clerk to change, either by increase or decrease, pensions allowed beneficiaries under Section 6, I am convinced that under the act of 1903, above referred to, the city clerk is without any authority in the premises whatever. Section 2 of the act provides:

“A board composed of five members, residents of such city, village or town, to be chosen as hereinafter provided, shall be and constitute a board of trustees to provide for the disbursements of said fund or funds, and designate the beneficiaries thereof as herein directed, which board shall be known as the Board of Trustees of the Police Pension Fund of such city, village or town. Three members of said board shall be residents of such city, village or town who shall not hold during their term of membership on said board any appointive or elective political offices or positions. They shall be appointed by the Mayor or the President of the Board of Trustees of such city, village or town. One of said members shall serve for a period of one year, beginning on the second Tuesday in May, 1903. One of said members shall serve for a period of two years, beginning on the second Tuesday in May, 1903. The other members shall serve for a period of three years, beginning on the second Tuesday in May, 1903. The successors to any of the foregoing trustees shall serve for a period of three years each, or until such time as their successors are appointed and qualified. The two other persons who, with the members above designated shall constitute said board, shall be chosen, one from the active police force and one from the body of pensioners under this act, of such city, village or town. The members to be chosen from the active police force shall be elected by ballot at an annual election, at which election all members of the active police force shall be entitled to vote. The members to be chosen from the body of pensioners under this act, shall be elected by ballot at an annual election, at which election all retired members of the police force, who are pensioners under this act and the

widows of all deceased pensioners, who are pensioners under this act, shall be entitled to vote. In the event that there shall be no widow surviving, then the guardian of any children of such deceased pensioner, where such children are also pensioners, may cast the vote to which such widow would have been entitled had she survived. The election in this section provided for shall be held annually, on the third Monday of April, under the Australian ballot system, at such place or places in such city, village or town, under such regulations as shall be prescribed by the three appointive members of said board: PROVIDED, HOWEVER, that no person entitled to vote under the provisions of this section shall cast more than one vote at any such election. In the event of the death, resignation or inability to act of any member of said board, elected under the provisions of this section, the successor of such member shall be elected at a special election, which shall be called by said board and shall be conducted in the same manner as are the annual elections hereunder. Suitable rooms for offices and meetings of such board shall be assigned by the Mayor or President of the Board of Trustees of such city, village or town."

In conformity with opinions heretofore rendered by the Corporation Counsel, the Mayor has already appointed three persons to serve as members of this board. These members, I am informed, have met for the purpose of duly electing a president, treasurer and secretary of the board, and have selected such officers in accordance with provisions of Section 9 of the act. The elective members of the board who may be elected under the provisions of Section 2, on the third Monday of April, 1904, will, of course, form no part of the board until their election at that time.

The board at present consists of the three persons appointed by the Mayor, and of none others. The board so composed has all the powers, duties and responsibilities of the full board of five, which will come into existence in next April, in such acts, the commission of which may be placed in the discretionary power of the board, and all acts rendered mandatory by the provisions of the act can be performed until the third Monday of April, 1904, only by the board of three per-

sons heretofore appointed by the Mayor. Any changes in the amount of pensions paid to beneficiaries, which are left to the discretion of the board, can only be effected by the board, and the making of such changes is strictly limited to the board.

The city clerk has no authority to control in any manner any of the acts or duties which by law are entrusted to the board appointed by the Mayor.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

COLIN C. H. FYFFE,

Acting Corporation Counsel.

SEPTEMBER 1, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

I beg leave to acknowledge receipt of your favor of the 15th ult., in which you ask what course the city should pursue to collect the amount of the annual license fee from any club which has sold liquor in past years without obtaining the license required by the Dram Shop Act and the city ordinance.

The city's power to license the sale of liquor is given by Paragraph 46 of Section 1, Article 5, of the Cities and Villages Act. This power is limited by Section 1 of the act of 1883, restricting the powers of counties, cities, towns and villages, in the issuance of dram shop licenses, so that the license shall not be less than at the rate of \$500 per annum. The power to license dram shops as exercised by the City of Chicago under ordinances prescribing a penalty for sales of liquor without licenses is not the levy of a tax. It is a police regulation.

The city can only collect a fee for a license where the license has been issued. Until the license has been issued, no debt arises for the fee payable for the license. Any person who sells liquor without a license makes himself liable to the penalty prescribed in the ordinance for such illegal act, but he cannot be liable for the payment of a fee for a privilege

which he has in effect refused to accept. If a liquor seller could be compelled, after a year's violation of the law prohibiting sales without license, to pay a license fee, it might well be argued that the payment of the license fee for the year in question condoned the various acts of violation. If this were true, and the argument in favor of it is not without plausibility, a liquor seller might take his chances upon the enforcement of the law. He might, that is, if he could elude the vigilance of the authorities, sell liquor without a license during the year, and when he found proceedings were likely to be taken for violation of the ordinance, make himself safe by payment of the license fee.

The argument against the right of the city to make such collection is put concisely in *Santa Cruz v. Santa Cruz R. R. Co.*, 56 California, 143, as follows:

"If defendant had violated the ordinance, it may be that its agents immediately connected with the unlawful act might have been prosecuted criminally; or it may be, if a specific fine was annexed to its violation by the ordinance, that defendant might have been sued in the police court for the amount of the fine. But we know of no legal principle which would enable us to assume that defendant had by implication, agreed to pay the amount of the license tax without taking a license. . . . The difference between the present and an action to recover a specific fine or penalty is manifest. The person carrying on a business for which a license is required cannot be compelled to take out a license. If he neglect or refuse to do so, he may be subject to a criminal prosecution, or he may be held to have agreed to pay a specific penalty instead of the amount of the license tax; but he certainly owes nothing for a license until he has taken out a license."

The case from which this quotation is made was approved by Moran J. in *City of Chicago v. Enright*, 27 App. Ct. 559. The city sued defendants on the theory that having sold spirituous liquors in quantities of one gallon or more without having obtained the license required by the ordinance, they became indebted to the city for the amount of the license fee. The court said:

"The consideration for a license is sought to be recovered,

while it appears from the allegations of said count that no license had in fact been taken out. The count was clearly bad and the demurrer to it was properly sustained."

Citing, *Santa Cruz v. Santa Cruz R. R. Co.*, supra.

One who sells liquor in this city without a license, becomes by that act a violator of the law and not a debtor to the city. His offense is not merely that he has conducted the business without payment of the license fee. Mere payment to the city of a license fee would not entitle him to the license until he had complied with the various requirements of the ordinance. These views are sustained by the following cases, in addition to those already cited.

Merced County v. Helm, 102 Cal. 159.

Hencke v. Standiford, 66 Ark. 535.

State v. Piazza, 66 Miss. 426.

State v. Adler, 68 Miss. 487.

From these considerations and the authorities cited, I am of the opinion that the City of Chicago cannot maintain any action for the recovery of the fee for a dram shop license where the license has not been issued.

Yours respectfully,

COLIN C. H. FYFFE,
Acting Corporation Counsel.

SEPTEMBER 1, 1903.

MR. FRED C. BENDER, City Clerk.

Dear Sir:

I beg leave to acknowledge receipt of your favor of the 28th ult., in which you ask an opinion as to the amount of payment to which persons upon the police pension rolls prior to May 16, 1903, are now entitled.

The act passed by the last legislature was approved and became in force May 16, 1903. It provides in Sections 3, 4 and 6 for various classes of pensioners.

First. Persons upon the force at the time of the taking effect of the act of 1887 or thereafter, and who shall have served for a period of twenty years or more and are over fifty years of age.

Second. Persons whose combined years of service upon

the police force and the fire department shall aggregate twenty years or more, and who are over fifty years of age.

Third. All officers entitled to and having a pension under the act of 1887.

The persons who belong to the first class mentioned must, I think, be upon the police force at the present time. The second class presents no difficulty. The third class indicates, as it stands, officers who are not only entitled to a pension but who are drawing a pension and have, therefore, left the force.

These three classes, after the taking effect of the new act, are to be paid a yearly pension equal to one half the amount of salary attached to the rank which the officer in question may have held on the police force for one year immediately prior to the time of his retirement, provided that the maximum pension shall not exceed the sum of \$900 and the minimum shall not be less than \$600 per annum.

The concluding clause of Section 3 contains the proviso that all "Police officers retired after twenty years' service in the police department of such city, village or town, and who are above the age of fifty years, now on the police pension rolls, shall receive the same pension now allowed them, provided that in no case shall said pension exceed the sum of \$900."

It is apparent that this clause either contradicts or must be taken to modify the earlier part of Section 3 in which the class is made of "all officers entitled to and having a pension under said act." This class manifestly includes all pensioners who have served on the force, both those whose right to a pension is based upon length of service and those whose rights are acquired through disability received in the performance of duty. The concluding proviso, however, of Section 3 does away with the minimum pension in the case of pensioners who have retired after twenty years' service and who are above fifty years old and are now on the rolls. That is to say, pensioners who have been on the police force are divided into two classes: Those who have become pensioners through disability and those who have become such by length of service. The former are entitled to receive as pension one-half the salary attached to the particular rank for

the year immediately preceding the date of retirement, not to exceed \$900 nor to go below \$600 per annum, while the pensioners by length of service receive "the same pension now allowed to them", limited by the maximum of \$900 per annum, without any stated minimum.

I am of the opinion that the pensions of those who have been retired on account of disability received in the performance of duty as policeman, should be increased to \$600 per annum, wherever it may fall below that amount. In case the pension of officers who have been retired by reason of length of service and age is less than \$600 per annum, no addition should be made. They should, under the terms of the act, receive "the same pension now allowed them", not to exceed \$900 per annum.

You make further inquiry as to the amount of the pension which should be paid to the widows and children of officers. Where the husband and father has lost his life in the performance of his duty as policeman, the pension payable yearly should be one-half the salary received by the deceased officer, "not to exceed \$900 and the minimum not less than \$600 per year." There is no difficulty in the case of the widow or children of a member on the police force who dies after ten years' service and while still in the service. In that case a payment should be made to the widow or children of a yearly pension of one-half the salary, "not exceeding the sum of \$900," but no provision is made for a minimum payment.

I think it is clear that Section 3 provides for pensions for the widow or children of officers who have served twenty years. In this case the widow is entitled to the pension of the deceased husband, and that pension by the proviso at the end of Section 4 is fixed at the amount of the pension allowed at the time of the passage of the act of 1903, provided that it shall not exceed the sum of \$900, without any minimum provision.

The result of this discussion of the act is, that in my opinion your action in paying all who were pensioners prior to May 16, 1903, one-half of the amount they were then receiving, where it did not exceed \$900, except pensioners re-

tired for disability and widows whose husbands were killed in the performance of their duty, in which cases the pension may not be less than \$600 per annum, follows the correct interpretation of the law.

Yours truly,

COLIN C. H. FYFFE,
Acting Corporation Counsel.

SEPTEMBER 3, 1903.

MR. L. E. GOSSELIN, Deputy Comptroller.

Dear Sir:

Referring to your favor of the 28th concerning the liability of the city to pay interest upon costs as well as upon a judgment, I would say that this question does not appear to have been passed upon by our Supreme Court, but the Appellate Court in the case of *Linck v. City of Litchfield*, 31 Ill., App. 104, has decided that a judgment for costs is a judgment within the provision of the statute for interest upon judgments. This case has been followed by the Supreme Court of California, *In re Kennedy*, 94 Calif., and the Supreme Court of Michigan in *Hayden v. Heffernan*, 99 Mich. 262.

Without stopping to criticise the *Linck* case, it is sufficient to say that there is a conflict in the authorities, and a majority of the cases hold that a judgment creditor is not entitled to interest upon his costs, and it is therefore suggested that you decline to comply with the demand made upon you for the payment of such interest. A brief reference to the authorities and the reasons of this opinion seem advisable. It should be borne in mind that interest is of purely statutory and not of common law origin. *Frazer v. Poss*, 66 Ind. 1, 17.

And, therefore, a party claiming the right to recover it should bring himself clearly within the statute. Costs, for example, are not such a part of the amount in dispute as to give a court jurisdiction by increasing the amount involved. See cases cited in Note 3, Encyclopedia Pleading and Practice, Vol. 5, page 109, first column.

It was held in *DeLizardi v. Hardaway*, 8 Rob. (La.)

20, that where a statute gives interest "on the amount of the judgment" a legislature did not contemplate giving interest on costs, and where a statute provided that "all judgments entered—shall bear interest until paid," it was held a judgment for costs was not included in the term judgment as there used, since this term was to be taken "in its strict technical meaning." *Gatewood v. Palmer*, 29 Tenn. 466 and in the following cases also the right to recover interest was denied:

Hill v. White, et al., 1 N. J. Eq. 435;

Whittaker v. Berry, 64 Me. 236;

Hammond v. Hammond, 2 Bland, 306, 366, 370.

And even if interest is to be allowed on costs it must be shown by the party claiming such interest, that he himself has paid the costs, and interest is payable only from the date of such payment.

O'Donnell v. Omaha, etc., Co., 31 Neb. 846;

Baun v. Reed, 74 Pa. St. 320;

Rogers v. Burns, 27 Pa. St. 525;

McCausland's Admr. v. Bell, 9 Serg. & R. 388;

Hamburger v. Kosminsky, 61 S. W. 958;

And see also *Enright v. Hubbard*, 34 Conn. 197.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Acting Corporation Counsel.

SEPTEMBER 8, 1903.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

Replying to your communication of July 13th, requesting an opinion as to whether or not permits should be withheld from house-movers who have failed to pay the Chicago Telephone Company for the expense of cutting wires necessitated by the removal of houses, I beg leave to state that the accompanying specimen of permit furnished this office contains no provisions requiring such payment by house-movers. I assume that the conditions on the back of all permits now issued

are in the form of specimen furnished and attached thereto, Clause 10 of which reads as follows:

“The house-mover shall pay for all cutting and splicing of fire alarm or other wires *belonging to the City of Chicago*, and for all damage done to shade trees, curb stones, curb walls, etc., etc.”

The portion underlined being written into the specimen permit aforesaid.

Section 2 of the Revised Code of Chicago of 1897 provides that:

“The Mayor shall grant licenses for the purposes authorized by this ordinance and may revoke the same at pleasure.”

By Section 270 it is provided in substance that:

“The Commissioner of Public Works shall issue a permit to every person holding a house-mover’s license upon payment of a fee of five dollars, such permit to specify the conditions, the route and the time limited for the performance of the work.”

Section 269 requires the person desiring to move a wooden building to obtain the written consent of the owners of adjacent property.

It appears that nowhere is the Commissioner of Public Works vested with any discretion to refuse a permit for the removal of a building to any person holding a license and who pays the requisite fee and has complied with the provisions of Section 269. It may be that in any given case if the commissioner becomes aware that the conditions of a permit are not being complied with he may revoke that particular permit, but it is not perceived how the commissioner may refuse a permit on the ground of non-compliance with the conditions of a former permit.

It would seem that the proper remedy for the Chicago Telephone Company, if any, would be an action for damages against any house-mover who in its opinion has unlawfully caused it an injury.

In my opinion you have no discretion to refuse a permit to any house-mover who has otherwise properly qualified merely on the ground of failure to pay the Chicago Telephone Company for expenses incurred as above, and this.

would be so whether the permits issued required such payment from house-movers or not.

All correspondence returned herewith.

Yours truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

SEPTEMBER 9, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

You have requested this department to inform you whether or not the city has authority to compel the Peoples Gas Light and Coke Company to remove or rearrange its tunnels under the river at Dearborn street to permit the erection of a new bridge by the Sanitary District.

Replying to your inquiry, I beg leave to say that the bridge over the Chicago River at Dearborn street and the ground underneath the river at that point are a part of Dearborn street, and the city is charged with the duty of keeping the same in a reasonably safe condition for public travel. The gas company is a mere licensee and occupies space under the said bridge subject to the paramount rights and duties of the City of Chicago. If the city itself were about to construct a new bridge, I have no doubt that it could compel the gas company to remove or rearrange the said tunnels; the fact that the Sanitary District is to build a bridge does not in my opinion affect the question in any way (see authorities collected in Vol. 36, American Digest, Section 733).

In the view above taken of this question it is immaterial whether the gas company ever had a permit to construct these tunnels or not as the rights of the city would be paramount in either case.

For the reasons above stated I am of the opinion that the city has the authority and the power to compel the gas

company to remove or rearrange said tunnels at the expense of the said gas company.

Yours truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

SEPTEMBER 14, 1903.

MR. J. F. McCARTY, Acting City Collector.

Dear Sir:

Referring to your communication of recent date, transmitting an inquiry from Mr. Frank J. Quinn, of Peoria, relating to the licensing of bootblack stands and other obstructions of that character, I beg leave to refer you to the case of *People ex rel. v. Harris*, 203 Ill. 272. This case decides that the streets of the city must be kept entirely free from obstructions of every nature inconsistent with their proper public use and that it is the duty of the proper authorities of a municipal corporation to keep the streets in such an unobstructed condition.

The Corporation Counsel of this city has heretofore rendered an opinion, on June 14, 1895, holding that the Commissioner of Public Works has authority to prevent peddlers and venders of all sorts from obstructing the streets or sidewalks of the city. This opinion is in conformity with Section 1839, Revised Code of 1897, page 390:

“No persons shall erect any booth or establish or fix any stand for the sale of fruit, books, or other merchandise, or any article or thing of value whatever, encumbering any part or portion of the streets or sidewalks, under the penalty of not more than five dollars for each offense.”

There is no ordinance of this city permitting bootblacks to occupy the streets or sidewalks with their stands, and I

think that any ordinance giving up public rights in the streets in this manner would not be a valid one.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

SEPTEMBER 15, 1903.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

I have before me the communication of Officers Thompson and Gallagher, relating to the violation of the license law by the Swedish Business Men's Club and F. Russinau. The question presented is whether or not the former organization, which is located at 171 East Washington street, upon the eighth floor and conducted by M. Hemmings, can run a bar and sell drinks under a license granted to Russinau who conducts a saloon in the same building at 173 Washington street. The Sherman House case referred to in your communication is now pending in the Criminal Court in this county and there has been no adjudication upon this question by our Supreme Court.

I am of the opinion that it is undoubtedly the law that one man conducting a place for the sale of liquors under a license cannot, under the same license, conduct a separate establishment unconnected with the place wherein his license permitted him to run a saloon.

Section 4 of an act to provide for the licensing of the sale of intoxicating liquors, approved March 30, 1874, provides:

"The license shall state the time for which it is granted, which shall not exceed one year, the place where the dram shop is to be kept, and shall not be transferable, nor shall the person licensed keep a dram shop at more than one place at the same time, and any license granted may be revoked by the county board whenever they shall be satisfied that the person licensed has violated any of the provisions of this act.

or keeps a disorderly or ill-governed house or place of resort for idle or dissolute persons or allows any illegal game in his dram shop or any house or place adjacent thereto."

It appears that the business of Russinau is in an entirely different place from that of the Swedish Business Men's Club, and that there is no feature of the hotel business connected with Russinau's establishment. They are not under one management.

The case of *City of St. Louis v. Gerardi*, 90 Mo. 640, is a leading one on this question. This was an appeal by the plaintiff from a judgment of the St. Louis Court of Criminal Correction, discharging defendant from a prosecution instituted by the city against him for selling liquor in violation of an ordinance of said city. The appellant had obtained a dram shop license to conduct a dram shop at 111 North 4th street, said number being the main 4th street entrance to the office of the Planter's Hotel. He conducted three separate bars in the hotel and the material provisions of the ordinance which defendant was charged with violating were:

"Applications for any license under this ordinance shall be made in writing, to the collector, and shall state specifically where the dram shop is to be kept," and that

"No person or persons to whom a license shall be issued shall keep a dram shop at any other place than the place designated," and that "any such license shall authorize the business therein designated to be carried on at one place only."

The court say:

"It is clear that this ordinance contemplates that the location of the place where a dram shop is to be kept shall be designated and that a license to keep a dram shop at such place does not authorize it to be kept anywhere else." Citing *State v. Fredericks*, 16 Mo. 82; *State v. Hughes*, 24 Mo. 147..

Under the recent decision of our Supreme Court requiring social clubs to take out a license for the sale of liquor, the Swedish Business Men's Club is required to take out a dram shop license, and under the decisions I have quoted and the provisions of Section 4 of the dram shop act, Russinau is

liable to a revocation of his license for a violation of the provisions of the dram shop act.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Acting Corporation Counsel.

SEPTEMBER 19, 1903.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In the matter of the application of John M. Roach for leave to install overhead trolley system on Lincoln avenue, I have prepared a formal opinion in answer to letter of inquiry of the Honorable, the Commissioner of Public Works, and for your immediate personal information I beg leave to submit a brief statement of the conclusions which I have reached.

First. The ordinance of the Town of Lake View for the operation of the street railway on Lincoln avenue north of Fullerton avenue is susceptible of two constructions; it is either:

(a) A mere license terminable at will, or

(b) A territorial extension of the ordinance of the City of Chicago for the operation of a street car line on Lincoln avenue south of Fullerton avenue to Center street.

In the former case the commissioner is, of course, under no obligation to issue any permit; in the latter case he is only under such obligation as arises from the city ordinance referred to above.

Second. The said city ordinance was passed in 1871, provided for animal traction, specified a duration of twenty-five years and was extended until July 30, 1903. It was passed long after the so-called "Ninety-nine Year Act." That act plainly refers only to ordinances then in existence. Even if, therefore, it were valid and operative as to then existing franchise ordinances (which is denied) it cannot, in my opinion, have extended or affected the ordinance in question, enacted years thereafter, or any franchise ordinance enacted after the date of its passage. In no view of the case, therefore, is there

any legal obligation on the part of the Commissioner of Public Works to now issue any license for the installation of an electric system.

Third. This makes it unnecessary to consider the ordinance of February 4, 1895, referred to by Mr. Roach in his letter as the authority for the installation of electricity, but even that ordinance contains the specified declaration that it "shall not be suffered or permitted to be so construed as to permit the use of cable tracks by the electric cars in any way or manner which will tend to supersede the use of cable cars or lines by electricity." An examination of the application and blue prints thereto attached plainly discloses the purpose of the receivers to be the substitution of an electric line for a cable line.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

SEPTEMBER 21, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

In the matter of the application of John M. Roach, General Manager for the Receivers of the Union Traction Company for a permit to install overhead trolley on the Lincoln avenue line, from Wrightwood avenue to Fullerton avenue, so that the Sheffield avenue electric line and the Lincoln avenue electric line north of Wrightwood avenue may be brought down over Lincoln avenue to connect with the electric line on Halsted street, I beg leave to say:

First. The ordinance for the street railway on Lincoln avenue from Fullerton avenue to Wrightwood avenue, was granted by the trustees of the Town of Lake View as an extension of their railway on Lincoln avenue within the city limits, terminating at Fullerton avenue. The ordinance neither specified the power to be employed nor the duration of the franchise. In my opinion it must either be regarded as an extension of the rights conferred by the city in the Lincoln avenue ordinance, from Center street to Fullerton avenue, or as a mere license terminable at will. It will be seen by what fol-

lows that it is not now necessary to decide whether this is a mere license or an extension ordinance, because in either view of the case the result must be the same so far as the application of the company to install said trolley system is concerned. If the ordinance of the Town of Lake View above referred to, is a mere license, without fixed duration and terminable at will, the Commissioner of Public Works would, of course, be under no obligation to grant any permit for the installation of electric power on said line.

Second. If, on the other hand, this ordinance be read in connection with the ordinance to which it refers and be regarded as an ordinance granting to the Union Traction Company the right to exercise those privileges on Lincoln avenue from Fullerton avenue to Wrightwood avenue in the Town of Lake View which it was then exercising on Lincoln avenue within the City of Chicago, the same conclusion must be reached, for the reason that the rights of the Union Traction Company to operate any street car line on Lincoln avenue between Center street and Fullerton avenue have expired.

The ordinance of the City of Chicago granting said rights was passed on May 8, 1871; the duration of the ordinance was twenty-five years, and on July 30, 1883, it was extended to July 30, 1903.

In my opinion the ordinance now under consideration was not affected by the so-called "Ninety-nine Year Act." That act was passed on February 6, 1865. Waiving for the present all consideration of the question of the validity of the "Ninety-nine Year Act" and the numerous questions which have been raised in regard to its construction, it clearly appears on the face of the act that no reference whatever is made to any contracts, stipulations, licenses or franchise ordinances, except those which had already been made, entered into or given, or made and amended prior to the date of the passage of said "Ninety-nine Year Act." The claim has recently been made that the "Ninety-nine Year Act" operated to extend not only all then existing street car ordinances, but all that might thereafter be enacted; but in view of the plain language of the act itself, such a view seems to me to be not only

untenable, but so absurd that the mere statement of the claim is sufficient to defeat it.

Even if, therefore, the Lake View ordinance above referred to be considered as a territorial extension of the rights conferred under the city ordinance above referred to, said city ordinance having been enacted long subsequent to the date of the "Ninety-nine Year Act", and having expired, the Commissioner of Public Works is without authority to issue any license for the installation of electric power on said line.

Third. It is therefore unnecessary to consider the questions presented by the ordinance of February 4, 1895, under which I understand the Union Traction Company receivers claim the right to install electric power wherever it may be necessary in order to connect its electric line on any street with its electric line on any other street; but I am also of the opinion that even under this ordinance the Commissioner of Public Works is under no obligation to issue the license applied for, because in the very ordinance upon which reliance is thus had it is stated that the ordinance is "not to be so constructed as to permit the use of cable tracks by electric cars in any way or manner which will tend to supersede the use of cable car or lines by electricity."

My conclusion, therefore, is that in no view of the case is the Commissioner of Public Works under any obligation to issue the license applied for by the General Manager of the Receivers of the Union Traction Company.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

SEPTEMBER 22, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have your communication of recent date requesting an opinion as to whether or not the twenty (20) feet taken from the east side of sub-lots eleven (11) and twelve (12) in Johnston's subdivision of lots one (1), two (2), three (3) and four (4), block twenty-three (23), fractional section fifteen

(15), addition to Chicago, township thirty-nine (39), north range fourteen (14), east third principal meridian, now used as an alley, is a public or private way.

This strip was dedicated as a public alley on May 4, 1886, by the then owner, Elbert W. Shirk. The determining question in this matter is whether there has ever been any acceptance of dedication by the municipal authorities or by public use. I am informed by the street department that this alley was paved about a year ago by the Illinois Central Railroad Company, that a permit was issued for this work, and that the alley is now open and being used as a public thoroughfare.

There is an absence of evidence from which an express acceptance of the dedication could be shown, but I think an implied acceptance is evidenced by the ordinance of April 19, 1886, a copy whereof is hereto attached. A well paved alley at this point is without doubt of considerable benefit to the public, and the rule is where the highway is beneficial to the public an acceptance will, in general, be implied.

Guthrie v. New Haven, 31 Conn. 308.

San Francisco v. Canavan, 42 Cal. 541.

Child v. Chapell, 9 N. Y. 246.

Abbott v. Inhabitants of Cottage City, 143 Mass. 521.

Elliott on Roads and Streets, 2d Ed., Sec. 152.

This doctrine, that the acceptance of ways may be presumed when they are for the benefit of the public, is founded on the broad fundamental principle that persons are presumed to accept that which is of benefit to them. The acceptance may also be shown by a long public use, the public in such a case standing as principals to the municipal officers, but such a long continued use does not exist at the present time.

In my opinion this is a public alley and should be so platted on the atlases of the map department.

Very truly yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

SEPTEMBER 29, 1903.

ARTHUR J. EDDY, Esq., President, Police Pension Board.

Dear Sir:

I have your communication of to-day wherein you ask for an opinion with reference to Section 3 of the act of the general assembly concerning the police pension fund, approved May 16, 1903, and more particularly as to:

First. Whether an officer who has reached the age of fifty years and served an aggregate of twenty years may voluntarily retire and claim the pension provided, though in good health and suffering from no disability.

Second. Whether an officer who has attained the age of fifty years and served twenty years or more and who is suffering from no disability and desirous of continuing in the service and refuses to make application for retirement and pension may be retired by the Superintendent of Police and thereby become a pensioner.

Touching the first inquiry, I am of the opinion that an officer who has reached the age of fifty years and served twenty years upon the force may voluntarily retire, and although in good health and suffering from no disability, it is mandatory upon the Pension Board to grant him a pension. The provisions of the act on this point only, eliminating the other provisions not pertinent to this question, may be quoted as follows:

“Whenever any person . . . shall be duly appointed and sworn and have served for the period of twenty years or more upon the regularly constituted police force . . . said board shall order and direct that such person, after becoming fifty years of age and (after) his service on such police force shall have ceased . . . shall be paid from such fund a yearly pension.”

It will thus be seen that the only requirements are:

- (1) Valid appointment and qualification.
- (2) Service for twenty years.
- (3) The attainment of fifty years of age.
- (4) Termination of service on the police force.

There can be doubt that when these four circumstances unite, it becomes mandatory upon the board to pay a pension.

I do not understand you to inquire whether a person may voluntarily retire from the police department, although your letter contains this inquiry, but I understand that inquiry to be coupled with the further inquiry as to whether or not a pension must be paid, although such person "be in good health and suffering from no disability." The answer to this question must be in the affirmative. The statute makes only four specific conditions for the payment of such a pension, in which the requirement of disability is not included. Indeed, it seems very clear that it was the intention of the legislature, by this section of the act, to provide for the retirement of superannuated officers *not* under disability. The act contains independent provisions for the retirement of officers physically disabled while in and in consequence of the performance of duty.

Touching the second inquiry, I am of the opinion that an officer who is desirous of continuing in the service and refuses to make application for retirement cannot be retired by the Superintendent of Police, even though he has attained the age of fifty years and served twenty years or more, except in compliance with the provisions of the civil service law or unless he be a hold-over and not entitled to the protection of that law. The act which you ask this department to construe contains no provisions for the retirement of an officer against his will, merely on account of age and length of service.

Very respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

SEPTEMBER 30, 1903.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter requesting a report upon the right of the Chicago City Railway Company to maintain railway tracks on 18th street between Wabash avenue and State street has been referred to me and I beg leave to submit the following:

The ordinance of August 22, 1864 (Special Ordinances, p. 1057), gave this company authority to construct, operate and maintain a street railway, with single or double track, and all necessary turnouts, etc., "upon and along 18th street from State street railway to the east line of Wabash avenue," subject to the ordinances "respecting horse railways in the South and West Divisions in force."

The ordinance of August 11, 1879 (Special Ordinances, pp. 1042-1044), to which the last mentioned ordinance refers, gave Fuller, Parmelee & Bigelow the right to maintain certain street railways for a term of twenty-five years from the passage of the ordinance and thereafter until the council should elect to purchase.

The statute passed February 6, 1865, commonly called "The Ninety-nine Year Act", undertook to extend this franchise.

The ordinance of August 11, 1879 (Special Ordinances, p. 1084), authorized the company "to take up and remove temporarily their railway tracks on 18th street between State street and Wabash avenue, with the right to reconstruct and restore the same with necessary curves and sidetracks whenever it shall be deemed by them desirable so to do; and afterward to maintain and use the said tracks upon the same terms and conditions," etc., theretofore granted under existing ordinances relating to the use of that portion of the street.

The ordinance of July 16, 1894 (Special Ordinances, p. 1180), granted this company authority to operate its cars by electricity "upon and along 18th street and Indiana avenue upon the tracks of the Chicago City Railway Company upon said streets respectively, with the right to connect and operate the same with the tracks of the Chicago City Railway Company at Wabash avenue and 18th street," provided there should be no overhead trolley on Indiana avenue except upon the written consent of the owners representing a majority of the frontage on that avenue.

The ordinance of July 30, 1883 (Special Ordinances, p. 990), granted authority to the company to use and operate until July 30, 1903, the several railways then used or operated by it.

From these ordinances I am of the opinion that the company had the right to maintain the tracks at this place while they were actually used for street railway purposes.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

SEPTEMBER 30, 1903.

MR. JOHN J. SLOAN, Superintendent House of Correction.

Dear Sir:

You have requested this department to render an opinion as to whether or not the act passed at the last session of the legislature, entitled "An Act to regulate the employment of convicts and prisoners in the penal and reformatory institutions of the State of Illinois, and providing for the disposition of the products of their skill and industry," applies to the House of Correction.

Being a public act, and remedial in its character, it is to be liberally construed, that is to say, in such manner as to carry fully into effect the intent of the legislature.

If, therefore, it can reasonably be said that the legislature intended to make the act applicable to the House of Correction, such construction should prevail. The legislative intent, according to a fundamental canon of construction, is to be determined from the language used in the act.

Gardner v. Collins, 2 Peters, 93.

Where the language used is clear and unambiguous, it must be literally followed. Limitations may not be inserted, nor special cases excepted which fall within the scope of the general terms used in the statute. It seldom occurs, however, that the language of a statute is absolutely free from ambiguity; that of the act now under consideration certainly is not. It will therefore be necessary to resort to the principles of interpretation, in order to determine the exact meaning and intent of the act.

It is a rule that words and phrases used in an act are

to be understood in their popular and common acceptance unless the context shows that a different meaning was intended.

The words "penitentiary" and "reformatory" as used in this act, are popularly and commonly understood to refer to the institutions located at Joliet, Chester and Pontiac; they are not understood as referring to the House of Correction of the City of Chicago.

Where the meaning of an act is doubtful, recourse is frequently had to the title for an explanation, and it is regarded as a legitimate aid in determining the intention of the legislature. It will be observed that the title of this act specified the "penal and reformatory institutions of the State of Illinois." If this were the sole criterion from which the legislative intent were to be determined, the act would clearly not be applicable to the House of Correction of the City of Chicago.

Bronk v. Riley, 2 N. Y. Sup. 266.

In the above case it was held that where a statute prohibited the employment of the convicts in the "penal institutions of the State" in certain trades and at certain labor, a penitentiary erected, maintained and operated by a county was not included.

There are throughout the act now under consideration expressions which might perhaps be regarded as applicable to not only State penitentiaries and reformatories, but also those operated by counties and municipalities. Such expressions as "all reformatories and penitentiaries in the State" and similar expressions occurring in Sections 6, 7, 11, 14, 17, 19, 22 and 24 of the act probably are susceptible of such meaning. There is, however, a further rule of construction which requires that all parts of an act must be construed together.

The act creates a "Board of Prison Industries of Illinois" to consist of the commissioners of the penitentiaries at Joliet and Chester and the managers of the reformatory at Pontiac. Section 2 of the act requires the said commissioners and managers, after a plan of operation shall have been established, to put such plan into operation "in their respective institutions." On the principle that "the expression of one thing

excludes all others," it would seem that no other institutions than those mentioned are required to adopt such plan.

The institutions to which the act applies are constantly mentioned therein as "penitentiaries and reformatories", and a careful reading of the entire act convinces me that the penitentiaries and reformatories spoken of are those located at Joliet, Chester and Pontiac.

"In construing a given act, the meaning of words or terms used therein may be gathered from the consideration of other acts in *pari materia*, in which such words or terms were also used."

23 A. & E. Ency. of Law, 316.

In all the existing statutes concerning penal institutions the words "penitentiary" and "reformatory" wherever used are used solely in connection with the State penitentiaries and State reformatory above referred to. (See Chapters 108 and 118 of the Revised Statutes.)

In the act authorizing our House of Correction, on the other hand, such institutions are uniformly spoken of as Houses of Correction.

It would seem, therefore, that in the present act the legislature, in using the words "penitentiary and reformatory", intended to designate the State institutions above referred to and no other.

A careful reading of the entire act, in the light of the principles of construction herein mentioned, convinces me that such was the intent of the legislature, and I am therefore of the opinion that the act in question does not apply to the House of Correction.

Very truly yours,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

SEPTEMBER 30, 1903.

MR. CHARLES J. BUHMANN, Superintendent of Maps.

Dear Sir:

I have your communication of the 23d inst. requesting

an opinion as to whether an alley in block three (3) of Fullerton's addition to Chicago in the west half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$), section thirty-one (31), township forty (40), north, range fourteen (14), east of the third principal meridian has been legally vacated.

The deed of vacation was executed and acknowledged by Fred W. Alwart and wife, book 7700, page 117 of records, said persons claiming to be the owners of lots 1 to 20 inclusive of block 3. The plat of Fullerton's Addition to Chicago, recorded May 7, 1879, book 14, page 57 of records, extends to the line which divides the right of way of the Chicago & Northwestern Railroad from the alley in question. It therefore appears that the person vacating this alley was the owner of all the lots in the parts claimed to have been vacated.

Section 6 of Chapter 109 of an act to revise the law in relation to plats, approved March 21, 1874, provides that:

"Any such plat may be vacated by the owner of the premises at any time before the sale of any lot therein by a written instrument declaring the same to be vacated, executed, acknowledged or approved, and recorded in like manner as deeds of land; which declaration being duly recorded shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds and all dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such right."

Section 7 provides that:

"Any part of a plat may be vacated in the manner provided in the preceding section and subject to the conditions therein prescribed, and provided such vacation shall not abridge or destroy any of the rights or privileges of other proprietors in such plat: And provided further, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law."

The conditions prescribed in the preceding section are simple:

First. If the vacation is of an entire plat (a) that the

vacation shall be before any lots are sold; or, (b) if any lots are sold, all the owners of lots in such plat shall join in the deed of vacation.

Second. If the vacation (as in this case) is of part of a plat, Section 7 provides clearly that any part of a plat may be vacated by the owner of such part (a) before any lots therein are sold, or, (b) after lots are sold, by all the lot owners in such part joining in the deed of vacation, provided, however, (c) that nothing in said section shall authorize the closing or obstructing of any public highway, laid out according to law.

The person vacating the alley is here the owner of all the lots in the part claimed to have been vacated, and so conditioned "b" above stated is complied with.

As to this vacation constituting "a closing or obstructing of a public highway" laid out according to law, the words "laid out according to law" include the doing of those things by proper local officers, such as designating the course or boundaries of any highway over the strip in dispute, or accepting it or ordering it worked as a highway.

Chicago Pressed Brick Company v. City of Chicago, 138 Ill. 628.

Whether or not there is evidence of acceptance to indicate the affirmative public action indispensable in such cases, this department is not advised, or whether long user of the way might be shown which would give the public prescriptive rights. This presents a question of fact which ought not to be solved against the rights of the city except on clear proof. Until such proof is made, your department should not assume that the vacation is legal.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

SEPTEMBER 30, 1903.

MR. L. E. GOSSELIN, Deputy Comptroller.

Dear Sir:

In your favor of recent date you asked this department for an opinion as to the rights of the City of Chicago under its ordinance of January, 1889, granting certain privileges to the Chicago Telephone Company subject to the conditions specified therein, as against the telephone company, so far as territory is concerned, which was annexed to the city subsequent to the adoption of the above mentioned ordinance and in which the telephone company was operating at the time of annexation under grants from other public authorities prior to annexation. In complying with the request contained in your letter, I desire to call your attention to the following facts:

Section 1 of the ordinance referred to is a grant to the telephone company for twenty years of permission to construct, maintain, repair and operate its lines of wires, etc., in the public streets of the city. Section 6 thereof provides that the telephone company "shall file with the comptroller of the city, on the first days of January and July of *each year*, a statement of its gross receipts from the telephone business done by said company *within the City of Chicago*, for the six months *next preceding* such statement—and, at the time of filing said statement, the said company shall pay into the city treasury three (3) per cent. on such gross receipts."

The telephone company duly accepted this ordinance.

At the time this ordinance was adopted by the city and accepted by the telephone company, the latter was operating in the following named towns or cities, as well as others presumably. In the Town of Cicero under the grants of 1885 and 1886; in the Town of Jefferson under the three ordinances of 1885 and the ordinance of 1882; in Washington Heights under the ordinance of 1884; in the Town of Lake under the ordinances of 1881 and 1883; and in the Town of Hyde Park under the ordinance of 1882. (Special Ordinances of Chicago, 1898.) The several grants from the above named towns or cities are all marked by the omission of any limitation upon

the period of time during which the telephone company may use the public streets.

The Towns of Hyde Park and Jefferson in August, 1872, obtained charters under the general act for the incorporation of cities and villages passed in the year last mentioned. Washington Heights did likewise in January, 1874, and the Town of Lake View in April, 1887.

The Towns of Lake and Cicero never obtained charters under the city and villages act, but up to the time of annexation to the City of Chicago were operating under private charters, the revised charter of the former town being granted by the act of March 26, 1869 (Private Laws of Ill., 1869, Vol. 4, p. 324), and the revised charter of the latter town by the act of March 25, 1869 (Private Laws of Ill., 1869, Vol. 3, p. 666).

The powers granted to said towns by the private acts referred to, to control, regulate or supervise streets or the use of them, are practically the same as the like powers conferred upon municipalities by the Cities and Villages Act.

The Town of Hyde Park was annexed to the City of Chicago June 29, 1889; the Town of Lake April 25, 1889; various parts of the Town of Cicero in April, July and November, 1889, and other towns at other dates, the dates mentioned being sufficient to illustrate the principles governing the questions here discussed.

In the construction of the ordinance of January, 1889, now under consideration, as a contract, two facts appear to stand out as of prime importance. First. The grantee of the rights conferred by all the ordinances of the annexed towns is also the grantee in the ordinance of January, 1889. Second. The ordinance of January, 1889, was adopted and accepted after the ordinances of the annexed towns had taken effect and while they were in effect.

Under the facts as herein set forth, the question presented is whether the Chicago Telephone Company is obligated to pay to the city semi-annually under Section 6 of the ordinance of 1889, three per cent. of the gross receipts of the business done by the company within the limits of the city, as those limits existed at the date of the acceptance of the

ordinance by the telephone company, or must the said semi-annual payments to the city by the telephone company be based upon the business done by the company within the limits of the city, as those limits existed during the six months next preceding the filing of each of the statements required by Section 6. I am of the opinion:

First. Such grants as are here involved, are to be construed in favor of the public and against the grantee, but invoking merely the ordinary rules governing the construction of contracts, it seems clear that the intention of the parties to the contract embodied in the ordinance was that it and all of its provisions should extend over such territory as might from time to time be added to the city, and that therefore the statements filed semi-annually by the telephone company in compliance with the provision of Section 6 of this ordinance, should show and should have shown the gross receipts from all the business done within the limits of the city as they existed during the period of six months covered by each of said statements, and the payments made to the city by the telephone company should be and should have been based on such total volume of business. This seems a reasonable conclusion, for Section 6 of the ordinance provides for a new statement every six months during the twenty years, thus indicating that a change in the amount of the gross receipts was anticipated. If the parties expected a growth of business and the increase in gross receipts incidental thereto and that a part of such growth and increase would result from a growth of population, in the light of common experience they must have also had in mind the probable, or at least possible growth of the city territorially and an incidental increase in business therefrom. The telephone company would hardly deny that this ordinance was designed to provide for the contingency of the future annexation of territory to the extent that the company under its provisions should have the right to extend its poles and wires into such territory as might be annexed and which the company had not occupied prior to annexation, whether or not such territory consisted of incorporated towns.

In Illinois Central Railroad Company v. Chicago, 176 U.

S. 646, a case in some respects similar to the present one, the charter of the railroad company was construed as to the right of the company to construct its tracks in territory newly annexed to a city, without complying with the restriction that tracks could be located *within cities* only with the *consent* of such cities. The court held that the growth of the city was "foreseen and contemplated in this legislation", and that the requirement of municipal consent for the construction of tracks applied to territory annexed to cities after the passage of the act as well as territory within the city limits at the date of the act.

In *People, ex rel vs. Deehan*, 153 N. Y. 531, it was held that a grant to a gas company to operate in the streets of a town without any expressed limitation is not restricted to existing streets, but should be construed as extending to the streets as subsequently enlarged, changed or opened.

In *City of Des Moines v. C., R. I. & P. R. R. Co.*, 41 Ia. 569, it appears that the city attempted to burden the railroad company's right to use a bridge under an ordinance, by subsequently imposing a charge for such use, upon the ground that the freight then passing over the bridge had doubled since the original ordinance was passed by reason of a new branch intersecting the railroad near the bridge. The court in this case said:

"Whenever and however the business may be brought to the road of the grantee or its assigns, it has the right to use and operate its track over the bridge for doing all its business, for when the business comes to it, such business is the business of the road regardless of the source from which or the manner in which it comes."

It seems plain then, that if the ordinance was intended to allow the telephone company the use of the streets in new territory after such territory was annexed, it also was intended to impose upon the telephone company the liability of paying a percentage of the receipts from the new business done in the additional territory.

If, as has been shown, the parties to the contract embraced in this ordinance, were looking to the future and contemplated a probable extension of the limits of the city and

a consequent growth of the company's business within the enlarged city limits, there is nothing in the ordinance indicating that the parties in looking to the future either had in mind only detached and unincorporated territory, but took no thought of the large and populous incorporated towns lying adjacent to the City of Chicago, or that in thinking of such towns, in which the telephone company was then doing business, they intended to except such towns entirely from the operation of their contract in the event of their annexation, and leave the company to conduct its business under the town grants. If it had been intended to except the existing and future business of the telephone company within the limits of the towns in which the company was then transacting business, in case of the annexation of such towns, from the conditions of the city ordinance of January, 1889, such intention could have easily been expressed and not left open to doubt.

Decatur Gaslight Co. v. City of Decatur, 120 Ill. 67, holds that where a city ordinance provided that a gas company should furnish gas "at rates as favorable as that furnished" by another company, a cheaper rate charged by such other company in a given year (eighteen years after the passage of the ordinance) was to be taken as fixing the rate for that year, the court saying:

"The word 'furnished' is used simply *without qualification* . . . the rate of the Springfield Company at the time of the furnishing of the gas should be taken and not its rate at the time of the passage of the ordinance. We think that to be the more natural and reasonable construction."

As suggested by the extract from the opinion of the court in the above case, it was insisted by the gas company that it was intended by the ordinance that the rates charged for gas should be determined by the rates at which the other (the Springfield) gas company *furnished gas at the time* the ordinance was enacted. (See also *Moore v. City of St. Paul*, 85 N. W. (Minn., 1901) 163; *Westport v. Mulholland*, 84 Mo. App. 319, 322 (Affd. 159 Mo. 86).

It may be contended that the telephone company refrained from insisting upon an express exception in the city

ordinance of its alleged rights in the town streets in reliance upon the provision relating to annexation of towns, etc., in the act of 1872 (Starr & Curtis' Ann. Statutes, Vol. 1, Chap. 24, Sec. 203, p. 794), that "such annexation shall not affect or impair any rights or liabilities either in favor or against such corporations," but plainly the answer is that this section of the statute, as applied to this case, is designed as much for the protection of the rights of the City of Chicago as for the protection of creditors or grantees of the annexed towns and therefore it throws no light upon the meaning of the ordinance. The act of April 25, 1889, relating to annexation, having been subsequent to the time of the adoption of the disputed ordinance, can be of no assistance in the construction of the latter.

My conclusion upon this branch of the opinion is then, that since the grants upon the several towns before referred to were in existence and the telephone company acting thereunder, when it accepted the ordinance of January, 1889, from the City of Chicago, and since it must have foreseen the likelihood of the annexation of such towns, it may well be said to have consented by its contract to the termination of its privileges under the town grants upon the annexation of said towns to the city and the substitution therefor of the rights and liabilities given and imposed by the city ordinance. It is true, the question of vested rights which will probably be raised here is left open in the Illinois Central Railroad case hereinbefore cited, with an intimation that if that question were involved the decision of the court might "possibly" be different, but the reasoning of that case and the other cases herein cited applies to the present controversy with great force, considering that Section 6 of the ordinance of 1889 uses the words "within the city" without limitation or qualification.

Second. If the telephone company had obtained rights in the streets of the annexed towns before their annexation, and the ordinance of January, 1889, be treated as legislation instead of as a mere contract, and therefore relating when passed only to the existing city limits, immediately upon the annexation of these towns this ordinance and all the other

ordinances of the City of Chicago (except those relating to dram shops) extended over and operated upon the new territory without regard to what the law relating to streets in such territory had been up to the time of annexation. *Moore v. City of St. Paul*, 85 N. W. (Minn.) 163; *The People v. Harrison*, 191 Ill. 257, 265; *C., R. I. & P. Ry. Co. v. City of Chicago*, 143 Ill. 641, 644. A denial by the telephone company of the correctness of this rule would involve the admission that if the company was and is now operating in such territory it was and is doing so without any authority, and it seems to follow clearly that if the grants from the annexed towns to the company were invalid the rule just stated applies with equal force.

Third. All the ordinances of the several towns hereinbefore specified as granting privileges to the Chicago Telephone Company in any of the public streets of the said towns before such towns were annexed to the City of Chicago were void because they were indefinite as to the time for which said privileges might be exercised, and the telephone company acquired no vested rights in the public streets of the annexed territory either by reason of the grants or by reason of any expenditures they may have made in said annexed towns in reliance upon their validity. For example, in *State of New York v. The Mayor, etc.*, 3 Duer, 119, it was decided that a grant by a city to a street railway company without any limit as to time, and by which the legal import and meaning of its terms may be perpetual is void. See also *Blaschko v. Wurster*, 156 N. Y., 437; *Ampt. v. City of Cincinnati*, 21 O. Cir. Ct. R., 300, and *Birmingham, etc., Ry. Co. v. Birmingham S. R. Co.*, 79 Ala., 465, 473. The conclusion reached under this branch of the present opinion is supported by principles of law that have long been established. It is the settled law of this State that a municipality holds the title to its streets in trust for the benefit of the public. *Chicago Telephone Co. v. N. W. Tel. Co.*, 199 Ill., 324, 346, 348; and the power of a city to grant rights in its streets to a telephone company is derived from the power given it to regulate the use of streets under the Cities and Villages Act. *Dickson v. Kewanee El. & M. Co.*, 53 Ill. App., 379; see also *Wyandotte El. Co. v. City*, 82 N. W., 821.

And a city cannot grant an easement permanently in the public streets for private uses. *Snyder v. City of Mt. Pulaski*, 176 Ill., 397; and in general "municipal bodies can exercise only such powers as are conferred upon them by their charters and all persons dealing with them must see that the body has power to perform the proposed act." It cannot even by contract control or embarrass its legislative powers and duties. *City of Danville v. Danville Water Co.*, 178 Ill., 299, 180 id. 235. *Freeport Water Co. v. Freeport*, 186 Ill., 179 (and other Illinois cases cited under "Third").

A municipal corporation intrusted with power of control over public streets cannot by contract or otherwise irrevocably surrender any part of such power without the explicit consent of the Legislature, and such a contract is invalid. *State of Minnesota Transfer Ry. Co.*, 83 N. W., 32. See also *Gas Co. v. Parkersburg*, 30 W. Va., 435, 440; *Syracuse Water Co. v. City of S.*, 116 N. Y., 167, 181; and *Altgelt v. City*, 81 Tex., 436 (cases in brief).

The rule is also established by a considerable preponderance of the authorities that where the constitution or statute of a State fixes the maximum period of time for which a franchise, or a contract relating thereto, may be granted or made, a franchise or contract running for an indefinite or a longer period is wholly void and will not be upheld for the valid period. *Flynn v. Little Falls E. & W. Co.*, 74 Minn., 180; *City of Somerset v. Smith*, 49 S. W. (Ky.), 456; *Manhattan Trust Co. v. City of Dayton*, 59 Fed. 327; *Blaschko v. Wurstler*, 156 N. Y., 437; *Town of Kirkwood v. Meramee H. Co.*, 94 Mo. App., 637; *Davis v. Harrison*, 46 J. L. 79; *City of Wellston v. Morgan*, 59 O. St. 147, 157; *East St. Louis v. East St. Louis G. L. & C. Co.*, 98 Ill., 415, 432, 455 (separate concurring opinion of Walker, J.), 19 Ill. App. p. 44; *East St. Louis G. L. & C. Co. v. City of East St. Louis* 47 id., 411; and *Garrison v. City of Chicago*, 7 Bliss, 480, 487; and in such a case the grantee in a franchise or the beneficiary under a contract cannot escape the application of the rule by asserting the principle of estoppel upon the ground that he incurred large expenditures under the belief that the city was acting within its powers or upon the ground that the city has received

a benefit. *City Council of Dawson v. Water Works Co.*, 106 Ga., 696; *Newport v. Railway Co.*, 58 Ark., 270; *Cincinnati G. L. & C. Co. v. Avondale*, 43 O. St., 257; see also *Atlantic City N. W. Co. v. Read*, 50 N. J. L., 665, 669; *Town of Hackettstown v. Swackhard*, 37 N. J. L., 191; *Hodges v. City of Buffalo*, 2 Den. (N. Y.) 170; *City of Detroit v. Detroit City Ry. Co.*, 56 Fed. 836, 876; *City of Ft. Wayne v. Lehr*, 88 Ind., 62; and see also *Higgins v. San Diego Water Co.*, 118 Cal., 524; *Hamilton v. City of Shelbyville*, 6 Ind. App. 538; and *McPherson v. Foster Bros.*, 43 Ia., 48.

It is true that in some of the cases cited under this part of the opinion, it is held that when these void contracts have been partially performed by the grantee or beneficiary, the city is liable to carry out, to some extent, the portion of its agreement which relates to and is dependent upon the part of the contract executed by the other party. The case of *Cincinnati G. L. & C. Co. v. Avondale* well illustrates this doctrine and the real principle upon which it rests. It appears from that case that the city in question was authorized to contract for ten years, but made an indefinite contract with a gas company which was decided to be void, subject to the duty of the city to pay for such gas as it had used, the court saying: "There is no question here . . . as to the power of the village to make a contract . . . to light its streets . . . but if the Council that entered into the written agreement exceeded its authority and had no power to make the contract set out, the defendant is not bound by the illegal terms of the same. . . . The company is bound to know the law and the powers of the Council." And the court declared the city liable to pay a reasonable price for the gas consumed, "not because of the contract, but because the village has used the gas."

Therefore, if the ordinances of the annexed towns were void by reason of the want of power of the towns to adopt them, the telephone company was occupying the streets of those towns merely upon sufferance and could have been ousted by the authorities of the towns at any time they saw fit to act, and if any notice was necessary by the town authorities by reason of their conduct, the obligation to give such notice could

not amount to more than an obligation *not* to exercise *rights* vested in the town authorities, without warning, which only had force during the existence of such authorities and ended with their official lives. *Parfitt v. Ferguson*, 3 App. Div. (N. Y.), 176; see also *C., R. I. & P. Ry. Co. v. City of Chicago*, 143 Ill., 641-644.

I am of opinion, for the reasons stated, that the Chicago Telephone Company was and is liable to the city for three per cent of its gross receipts upon the business done by it within the entire city limits for any given six months.

Respectfully submitted,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 1, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Answering your letter of the 25th ult., inquiring whether or not there is any legal objection to the granting of a permit to the Northwestern Elevated Railroad Company to move the station at Randolph street and Fifth avenue and to extend its platform in accordance with the blue prints transmitted with your letter, I beg leave to say:

In response to an application of the Northwestern Elevated Railroad Company, dated March 24th, 1903, and your letter of March 26th transmitting said application to this department, an opinion was rendered you by this department, and approved by my predecessor, under date of April 3d, 1903, holding that the application could not be granted for that part of the loop structure on Lake street, because of the provision in the ordinance for the construction of that part of the elevated loop providing that platforms should not exceed 180 feet in length. Said opinion also stated that the ordinances for the construction of the elevated railroad on Fifth avenue, Wabash avenue and Van Buren street provided that the platforms "shall be so constructed and main-

tained as not to unnecessarily impair the usefulness of the street or any portions thereof," and you were advised as follows: "If the proposed extensions on these three streets, or either of them, will unnecessarily impair the usefulness of the street, you have no authority to grant the desired permit." It seems that this opinion has been construed as acknowledging a right of the Northwestern Elevated Railroad Company to make the alterations in its structure described in its said application of March 24th, 1903, and the blue print thereto attached, and that on May 27th, 1903, a permit was granted to extend the station platforms of all the stations on the loop in accordance with said blue print. This was a misapprehension of the opinion. The opinion contains not one word admitting the right of said company to make such extensions, but is confined entirely to the statement of two objections to said construction. The opinion did not attempt to pass upon the question as to whether, if these objections did not exist or if the latter objection did not arise from the nature of the work contemplated, the power to issue permit was vested in you or in the City Council. So far as I am aware, this very question has never been passed on by this department, but the nature of the application and the extent of the work intended to be and now being done under it, most forcibly illustrates the importance of the question.

For a proper determination of the questions thus presented, it is necessary, at the outset, to consider the character and extent of the construction and alterations for which the company now asks your authority. The elevated railway, so far as the loop division is concerned, has been a completed structure for several years. The companies owning the various sections of said loop filed their plans with the Commissioner of Public Works, under their original ordinances, showing the location of stations and platforms. These plans were duly approved and the elevated structure erected. The application now under consideration, together with that of March 24th, 1903, is not for the completion of unfinished work authorized by the original ordinance, but for an entire reconstruction and alteration thereof. For example: the very application in question, on Fifth avenue, presents the fol-

lowing conditions: The original station was at the alley between Lake and Randolph streets; the blue print shows that that station is to be removed and a new and much larger station, containing apparently more than double the area of the former, is intended to be constructed at the intersection of Randolph street and Fifth avenue. Said blue print also shows that the platforms as constructed under the original ordinance were 228 feet in length; that it is proposed to maintain those platforms and add to them an extension of 287.33 feet, making a total platform length of 515.33 feet. The station and platforms at Madison street are in process of extension, so that the platforms will extend north of the alley north of Madison street, and more than one-half of the Fifth avenue branch of the loop, much more than one-half of the Van Buren street loop and more than one-half of the Wabash avenue loop will be covered by stations and platforms if the projected plans are permitted to be consummated. In other words, this is an effort to at least double the platform and depot area of the "Union Loop." An authority for the making of this change, which will almost change the streets in which the loop is situated into tunnels or two-story streets, is asked not from the City Council, but from you.

The first question of law which presents itself in natural logical order is as to whether you have the authority to grant the permit applied for, or whether that authority must be sought from the City Council.

There are two ordinances applicable to the construction and maintenance of the Fifth avenue section of the elevated loop. The first was an ordinance passed January 8th, 1894 (Special Ordinances, Vol. 2, pp. 933-944), and the next an ordinance amending said ordinance of January 8th, 1894, passed June 24th, 1895, and accepted by the Northwestern Elevated Railroad Company on August 19th, 1895 (Special Ordinances, Vol. 2, pp. 944-950).

An examination of these ordinances discloses the fact that both of them were passed and accepted before the construction of the loop; that they contained provisions for the construction, operation and maintenance thereof, but that they contained no provisions for the alteration or reconstruction

thereof. In my opinion there can be no doubt that when the elevated railroad company once completed the construction of the elevated railway described in said ordinance, the authority granted by said ordinance, so far as concerned all matters of construction, was exhausted, and in that respect the ordinance was *functus officio*. I am of the opinion that your authority to issue permits for the construction of any station, platform or other thing authorized by said original ordinance and the amendment thereto, terminated with the completion of the road, and that you are not authorized to issue permits for alterations or additions thereto.

I have also examined with much care the general provisions of the city ordinances defining the duties and powers of the Commissioner of Public Works, and find throughout, these powers and duties carefully limited, so far as issuing permits is concerned, to those things which have been duly authorized by ordinance. The power of a public officer has been repeatedly limited by the courts to those acts and things which are either specifically named in the ordinances or which are derived therefrom by necessary implication; that is to say, those without which the express provisions would be inoperative. The same doctrine of strict construction has also been universally applied to the construction of the rights vested in corporations by statutes and ordinances, and it has been well said that, so far as the rights granted to corporations encroach upon public or common rights, "they are undoubtedly to be construed most strongly against those setting them up, and in favor of the state or public; they are not to be extended beyond the express words in which they are given or their clear import, and what is not given in unequivocal terms is to be deemed as expressly withheld." (Endlich on Interpretation of Statutes, Section 354.)

In my opinion, these two fundamental principles of law: first, that your authority is to be strictly construed and, unless expressly declared, is to be denied; second, that the rights of corporations where they come in conflict with the rights of the public are to be strictly construed, and unless given in unequivocal terms, be deemed as expressly withheld—lead irresistibly to the conclusion:

First. That you have no right to grant the permit for which application is now made.

Second. That you were without authority to issue the permit heretofore granted under date of May 27th, 1903.

Third. That the applicant is not entitled to exercise the right for which application is made, unless and until a new grant of power is made for that purpose by the City Council of the City of Chicago.

Very respectfully yours,

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 6, 1903.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have examined with care the brief submitted to you by Clarence A. Knight, attorney for the Northwestern Elevated Railroad Company, in the matter of the revocation of the permit to said company for the alteration, reconstruction and enlargement of its stations and platforms on the elevated loop.

Mr. Knight admits that the ordinance authorizing the extension, construction and operation of said elevated railroad is to be more strictly construed than an ordinance or contract relating to the construction and maintenance of a road upon the right-of-way of a railroad company owned in fee, but insists that our construction thereof is too strict.

In my opinion of the 1st inst. to the Honorable, the Commissioner of Public Works, a copy of which I hereto attach, I said:

“The power of a public officer has been repeatedly limited by the courts to those acts and things which are either specifically named in the ordinances or which are derived therefrom by necessary implication; that is to say, those without which the express provisions would be inoperative. The same doctrine of strict construction has also been universally applied to the construction of the rights vested in corporations by statutes and ordinances, and it has been well said that, so far as the rights granted to corporations encroach upon public

or common rights, 'they are undoubtedly to be construed most strongly against those setting them up, and in favor of the State or public; they are not to be extended beyond the express words in which they are given or their clear import, and what is not given in unequivocal terms is to be deemed as expressly withheld.' "

This ordinance should not be so strictly construed as to become inoperative or to defeat the object and purposes intended to be accomplished thereby, but it is difficult to understand how the construction of the ordinance adopted by this department, holding that the application in question should be passed upon by the City Council, and not by the Commissioner of Public Works, can be said to defeat the purposes of the legislation.

Counsel in his brief seems to contend that the rules of law applicable to the rights of railroads to alter, extend, or increase their facilities on rights-of-way acquired by condemnation or purchase, are applicable also to companies operating by municipal ordinance on public streets. The distinction is obvious and is repeatedly stated in the opinions cited by him in his brief. Such right of extension and alteration in the former class of cases is based upon the fact that the railroad company owns the right-of-way in fee. In the case under consideration, the city is the owner of the fee, in trust for the public, and the rights granted to the railroad company are subsidiary to the public rights. It is for this reason that the familiar doctrine above quoted applies to this case, and distinguishes it from those cited by counsel; namely, so far as the rights granted to corporations encroach upon public or common rights, they are undoubtedly to be construed most strongly against those setting them up, and in favor of the public, and what is not given in unequivocal terms is to be deemed as expressly withheld.

Bearing upon this general doctrine, counsel cites another line of cases which, upon examination, are found to be cases in which the rights under consideration, although exercised in a public street, are clearly and unequivocally expressed in ordinances which, in addition to the clear grant of power, con-

tained no limitations whatever, upon the exercise of the rights under consideration therein.

For the reasons stated, therefore, the cases cited in the first eight pages of said brief do not apply to the question under discussion.

In the second part of his brief, counsel undertakes a discussion of the provisions of the ordinance. He omits, however, any reference to the ordinance of June 24th, 1895, amending the ordinance of January 8th, 1894. The provision of the ordinance giving the Northwestern Elevated Railroad Company the right to construct and operate an elevated road in Fifth avenue, so far as applicable to this question, are as follows:

First. The ordinance of January 8th, 1894. This ordinance was extremely indefinite, both as to the various rights-of-way therein described and also the constructions authorized by Section 7 of said ordinance. While not locating the stations and platforms it contained the following, among other provisions:

“The said company shall have permission and authority . . . to construct and maintain . . . all necessary or proper stations, platforms and depot stations, and to connect the same with said streets, avenues and alleys, by means of all necessary stairs, stairways, . . . and other constructions and appliances for . . . the accommodation of passengers, but such platforms, stations, stairs, . . . shall be so constructed and maintained as not to unnecessarily impair the usefulness of such streets”

“The plans and specifications of such depots, platforms and stairs shall be submitted to and approved by the Commissioner of Public Works before the work of construction thereof shall be commenced.”

Second. The amendatory ordinance of June 24th, 1895: This ordinance more definitely describes the various rights of way and the form of the structure. Clause “C” contains the following:

“The structure of such elevated railroad in Wells street and Fifth avenue, between Michigan street and Harrison street, shall be made as light and presentable as is compatible

with the traffic thereon, and the space between the cross ties of the tracks and also the space between the tracks themselves shall not be floored or otherwise closed, *but shall be left open for the transmission of light, except at stations, so far as necessary, to provide for passenger platforms.* Said structure shall be what is known as lattice work construction.

"A station of such elevated railroad may be located at or near the intersection of Lake street and Fifth avenue.

"(e) Stations of said elevated railroad in and along said route . . . between Institute place and Harrison street, may be located at or near . . . Fifth avenue and Lake street, and at such other places as may be agreed upon between the railroad company constructing and operating the railroad at the point in question and the Mayor and Commissioner of Public Works of said city.

"(f) That portion of said main line of said railroad hereby authorized to be constructed from Institute place to Harrison street, shall be constructed, equipped and in operation within the period of time fixed in and by Section 10 of the said ordinance of January 8th, 1894, . . . and unless said main line of said railroad . . . shall have been so constructed, equipped and in operation before the expiration of the period last aforesaid, then all the rights and privileges granted as to that portion of said railroad which shall not have been so constructed, equipped and in operation, shall cease and be void, but the rights and privileges as to the portion of the said railroad which shall have been constructed, equipped and in operation, shall remain in full force."

Third. An agreement with reference to the foregoing ordinances was executed by the Northwestern Elevated Railroad Company and delivered to the City of Chicago under date of July 1st, 1895, and appears on page 950 of the Special Ordinances of Chicago, Volume II. This agreement contains the following clause:

"*Fourth.* Except as otherwise expressly provided by said amendatory ordinance of June 24th, 1895, all the conditions, restrictions, obligations and limitations contained in

said original ordinance of January 8th, 1894, shall continue in full force and effect against said railroad company, notwithstanding the passage of said amendatory ordinance, and shall likewise be applicable and operative against said railway company in respect to said amendatory ordinance, with like effect as if expressly set forth in said amendatory ordinance.”

Fourth. Both of the said ordinances are full of provisions, too numerous to mention, providing that the detailed plans and drawings of the construction thereby authorized shall be filed with the Commissioner of Public Works, subject to his approval, and that when so filed and approved, it shall be the duty of the Commissioner to see that the company constructs its elevated road in accordance with said plans and drawings. This method was adopted by the City Council for the sake of brevity and greater clearness, and the legal effect, in my opinion, of the filing and approval of said plans so referred to in said ordinance is the same as though the original ordinance contained at length apt words of description identical in effect with said plans. The plans for the station in question were filed with the Commissioner of Public Works and approved by him, under the provisions of the last clause above quoted from Section 7 of the ordinance of 1894, and in my opinion the legal effect is the same as though the ordinance specifically described said station.

Fifth. None of the said ordinances contain any language authorizing the alteration, reconstruction or enlargement of stations or platforms, nor any clauses which can be construed to give the Commissioner of Public Works continuing authority to issue permits for alterations upon the structure when once erected.

From a review of these provisions of the ordinances and agreement in question, and after due consideration of the brief above referred to, I see no escape from the following conclusions:

(a) It was the intention of the Council to authorize the construction of an elevated railway clearly and definitely described, and it was not their intention to give to any officer or to said company a “roving commission” to build any other or

different structure than the one described in said ordinance and in the drawings referred to therein.

(b) It was not the intention of the Council by said ordinance to authorize any alterations in or additions to the structure when once completed.

(c) It was their intention to guard most carefully the right of the public to the enjoyment of streets in which there would be a minimum interruption of light and air by reason of the construction.

(d) It was their intention that the restrictions of both ordinances should always remain in full force.

(e) It was intended by the Council that if the company desired additional facilities for the operation of its tracks and the accommodation of the public, application for such privileges should be made to the Council and not to any administrative officer.

From the foregoing conclusions of fact it seems to me that the following conclusions of law necessarily follow:

First. The failure to delegate to the Commissioner of Public Works authority to issue permits for alterations and additions amounts to a denial of such authority.

Second. The failure to grant to said company the privilege of reconstructing, altering or adding to its tracks, so far as reconstruction, alteration, or addition is sought to be made on that portion of the right of way of said company located on the public streets of the city, is a prohibition of such alterations, reconstruction or additions on said public streets.

Third. The elevated structure when once completed under said ordinance, so far as concerns that portion thereof erected on the public streets, exhausts the power of said company under said ordinance, and said ordinance so far as concerns construction, is *functus officio*. This last point is argued at some length in said brief, but every case cited to the contrary of the position stated in my original opinion herein is, upon examination, seen to be a case where the ordinance itself recognized and authorized additions to the structure in the future. That the proposed alteration in the platforms of this company are identical with those recommended in the Arnold report; that they will facilitate the "receipt and passage of

passengers", and that they may increase the revenue of the city, or at least prevent its decrease, are considerations for the City Council, and have no legal bearing on the question before this department. These considerations will doubtless receive due attention from the City Council.

Only one more line of argument contained in said brief requires consideration. It is claimed that this department has heretofore decided this very question in favor of the position of the company. As already stated in the original opinion in this matter, this is a misconstruction of the opinion, and I have learned, as a result of a conference with my predecessor, that the questions herein discussed were not raised or considered at the time of the original application for the permit. Even if they had been considered it is unnecessary to state that the legal situation would not be affected thereby nor by the fact that a permit was issued, the contract for the work let and a portion thereof constructed. Such considerations also are properly to be addressed to the legislative branch of the city government.

Respectfully submitted,

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 6, 1903.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

I have your communication of the 2d inst., requesting opinion as to whether the city and county authorities can be compelled to equip the City Hall and County Building with fire escapes in conformity with Section 209 of the building ordinance, passed March 28th, 1898.

This ordinance classifies all buildings which are required to be equipped with fire escapes under Classes I., II., III., IV. and V. Class I. includes buildings used for storage and manufacturing; Class II., hotels and boarding houses; Class III., residences; Classes IV. and V., assembly halls.

In my opinion, the buildings referred to in your communication are not included in any of the classifications above mentioned. The only class in which these buildings could

possibly be included would be Classes IV. and V., which are "all buildings used as assembly halls for large gatherings of people, whether for the purposes of worship, instruction or entertainment."

I think that neither of these public buildings come within this classification.

To proceed beyond the direct inquiry concerned in your letter, however, and to pass upon the real question as to whether these buildings should be equipped with proper fire escapes by the authorities that control them, I am of the opinion that both the buildings are embraced within the statute relating to fire escapes, Chapter 55a, Hurd's Revised Statutes, 1901, page 944, which provides:

"Within six months after the passage of this Act, all buildings in this State which are four or more stories in height . . . shall be provided with one or more metallic ladder or stair fire escapes attached to the outer walls thereof and extending from or suitably near the ground to the uppermost story thereof, and provided that platforms of such forms and dimensions and in such proximity to one or more windows of each story above the first as to render access to such ladder or stairs from each such story easy and safe."

The buildings in question are not only tenanted during the day time by large numbers of employes whose safety should be regarded in the event of fire, but are thronged during business hours by the general public, and I see no reason why the fact that the one is owned by a municipal corporation and the other by a governmental body of the State, should exclude either the persons working in such buildings or the general public frequenting the same from the safeguards provided by the statute.

While the county authorities might not be subject to damage suits for injuries sustained through the failure of such authorities to provide the fire escapes required by the statute, the City of Chicago would in my opinion be liable for derelictions in the way of a failure to provide statutory means of egress from the City Hall in case of a fire wherein persons were injured.

To conclude, I think that both the City Hall and the

County Building should be equipped with such fire escapes as the statute requires and that the Board of County Commissioners should be notified to comply with the law in this respect.

Yours truly,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 6, 1903.

ARTHUR R. REYNOLDS, M. D., Commissioner of Health.

Dear Sir:

Answering your letter of October 3d, transmitting affidavits of Mary Cook and Gertrude F. Howe, opinion of James Donahoe and communication of T. J. Corcoran, I beg leave to say:

The transmission of these affidavits to you by order of the Civil Service Commission makes it your duty to investigate the charges therein contained against Edward T. Grannan, and upon the making of such investigation it is then your duty to decide whether or not in your opinion charges ought to be preferred.

It is not your duty under the law to prefer charges before the Civil Service Commission merely because affidavits are filed with you which contain accusations against a civil service employe. You are at liberty to decline to file such charges if, after a full investigation, you are of the opinion that the accusation is unfounded. This right of refusal, however, is based upon a prior compliance with the request to investigate. Such a request is one with which you cannot refuse to comply.

In coming to a conclusion as to whether or not charges should be filed against Edward T. Grannan upon the face of these affidavits, I beg leave to state:

First. If a civil service employe in prosecuting a suit for the breach of a city ordinance wilfully swears falsely, and as a result of such false testimony conviction is had, and proof

of the offense of perjury is clear, this constitutes proper ground for the filing of charges. The decision of the court is not to be regarded as absolutely an adjudication of the facts, because such adjudication may have been brought about by the alleged perjured testimony.

Second. On the other hand, in making up your mind as to whether or not charges should be filed in such a case, you have the right, and it is your duty, to consider whether or not there was a full and fair hearing in the court upon the very issue now involved in the charge of perjury. If the record shows that the parties were not taken by surprise, that they introduced evidence on the question at issue, that this question was fairly submitted to the court, so that the court had an opportunity to pass upon the credibility of the witnesses and come to a fair conclusion upon the matter, then the decision of the court under such circumstances is entitled to the greatest possible weight, and the accusation of perjury should not be entertained merely because of the subsequent discovery of mere cumulative evidence.

Yours very sincerely,

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 7, 1903.

MR. L. E. GOSSELIN, Auditor.

Dear Sir:

I have received your letter of recent date in which you request me to advise "as to the correctness of the method of computing the percentage of receipts due the city by the Northwestern Elevated Railroad Company," in which letter you say: "The Northwestern Company, in making report of moneys due the city, bases the percentage upon the moneys received from the passenger traffic, and renders no account of moneys derived from advertising."

On page 982 of the Special Ordinances of 1898 appears an agreement executed by the Union Elevated Railroad Company and the Union Consolidated Railway Company, which was duly delivered to the City of Chicago, containing, among other things, the following provisions:

“Said railroad companies and their respective successors and assigns, and whoever shall control and operate the said loop line, or be in receipt of or entitled to receive the tolls, income, rents, issues and profits thereof, shall pay the said city, semi-annually, . . . in addition to all and any payments expressly by said ordinance or by any other ordinance of said city required, a proportionate amount, as hereinafter stated, of such tolls, income, rents, issues and profits, after making a deduction therefrom at the rate of \$250,000 a year on account of the interest charge against said loop line before computing said proportionate amount. Said tolls, income, rents, issues and profits, within the meaning of this agreement, shall not include the expenses for maintenance and operation of said loop line, including taxes, which are all understood to be exclusively payable by certain other corporations proposing to use said loop line, although so payable through said railroad companies, or one of them. From said tolls, income, rents, issues and profits, within the meaning of this agreement, a deduction shall be made, semi-annually, at the rate of \$250,000 per annum, to cover interest charge as aforesaid, and upon or out of the amount from time to time, remaining, which remaining amount shall, for convenience under this agreement be designated as the gross receipts of said loop line, payments shall be made to said city of the following percentages:”

I construe this agreement to mean that the percentage is to be computed on every dollar received by the company or companies controlling and operating the loop, except the moneys which are paid to them by subordinate companies as a contribution to their share of the expenses of maintenance and operation, deducting therefrom \$250,000 annual interest charges. The fact that this agreement goes out of the way to specify that moneys received by the operating company from other companies as their contribution to the expense of maintenance and operation shall not be included in the amount upon which the compensation is to be computed, and that a specific amount was agreed upon as a deduction on account of interest, indicates clearly that every other dollar received from any other lawful source was intended to be included in the amount upon which the percentage should be computed.

There can be no doubt that receipts from advertising are included with the terms "income" and "profits", and if the company is in the receipt of moneys from such sources it is under obligation to pay the percentage thereon.

This department has, however, heretofore held in an opinion approved by my predecessor, Hon. Charles M. Walker, that the company under its ordinances has no right to maintain advertising signs. In this opinion I entirely concur. Litigation is now pending in court, at the instance of private citizens, for the determination of this question. Until the right of the railroad company under its charter and ordinances to engage in advertising is determined, the city should not be put in the position of asking for a portion of the receipts from such source. If it should be held hereafter that the company had the right to engage in said business, it would be time enough then for the city to make its demand for compensation.

I do not now intend to be understood as passing upon the question of whether or not the city would be entitled to demand a percentage of these receipts if the court should decide that the business was unauthorized. It will be time to decide this question when it arises.

I think, however, that in view of the fact that ordinances are pending before the Judiciary Committee of the City Council for the granting of authority to rent advertising space on elevated railways, it would be advisable for you to inform that committee of this opinion, and suggest to them that if they are about to authorize the elevated roads to rent advertising space, and thus legalize the business which has hitherto been illegal, it will be entirely proper, as a condition precedent to such legislation, to require the elevated roads to pay into the city treasury the proper percentage of the moneys heretofore received by them from such sources.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 7, 1903.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

Your letter of October 3d, requesting an opinion as to

the right of the Chicago & Western Indiana Railway Company to project the abutments of its elevated tracks within the limits of Sixty-third street, thereby narrowing the roadway, has been duly received.

The ordinance with reference to this matter contains two provisions which must be considered. In the printed Council proceedings of October 23d, 1899, p. 1417, there is a specific provision as to the subway in Sixty-third street, which provides that the width between the walls of the subway shall be sixty-six feet; also the following provision: "Width of roadway and sidewalk outside of subway shall be the same as they now exist in Sixty-third street." If these provisions stood alone, there would be no doubt that the company was not entitled to project the abutments or retaining walls of its structure within the limits of Sixty-third street.

Section 3 of Paragraph 13 of the same ordinance (C. P., p. 1400) contains the following:

"The said elevated tracks shall be carried across all intersecting streets, avenues and alleys, which by the terms of this ordinance are to be provided with subways, on suitable bridges . . . [Here the bridges are described.] . . .

The said bridges shall be supported on abutments of concrete stone or brick masonry, or on rows of iron or steel columns . . . [Here the ordinance tells where and how the columns shall be erected.] . . . Provided, it shall be found necessary to construct any retaining or side walls in connection with any approaches to subways, then such walls may be constructed within the limits of the streets, alley or way upon which such approach is situated, and the abutments or side walls of the subway itself, reached by such approach, may be correspondingly advanced into the street, so as to be in a continuous straight line with the approach wall. . . ."

I am of the opinion that if it is necessary to construct in Sixty-third street retaining walls in connection with approaches to the Sixty-third street subway, then the abutments of the bridges may be advanced so as to be on a line with the walls of the approach. If, on the other hand, Sixty-third street is a street which has no approaches to the subway, or if the situation is such that no retaining walls are necessary

in Sixty-third street leading to the right of way, the proviso above quoted does not apply, and the abutments of the bridges cannot be projected into Sixty-third street, but Sixty-third street must be kept open the full sixty-six feet of its original width.

The ordinance seems to me to be very plain. The authority to advance the abutments of the bridges is strictly limited to those cases where retaining walls are required in intersecting streets. This presents a question of fact for your determination.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 9, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At your meeting on September 28th, 1903, an order was passed directing this department to render an opinion on the ordinance published at page 2677 of the Council proceedings of 1902-3, entitled "An Ordinance to Establish a Department of Local Transportation", which ordinance was recommended for passage by the Committee on Local Transportation March 16th, 1903.

The ordinance creates an executive department of the municipal government of the city. The first question to be decided is: Has the City Council power to establish the office?

"A municipal corporation cannot, in the absence of express authority, create an office, define its duties, appoint an incumbent and invest him with the powers of a municipal officer."

Hoboken v. Harrison, 30 N. J. L., 73.

Article six (6) of the General Incorporation Act for cities and villages, under which Act the City of Chicago derives its charter powers, confers authority upon the City Council to provide for the appointment of such officers as it may deem necessary or expedient. Said section is:

"Section 2. The City Council may, in its discretion, from

time to time, by ordinance passed by a vote of two-thirds of all the Aldermen elected, provide for the election by the legal voters of the city, or the appointment by the Mayor, with the approval of the City Council, of [Here certain officers are named.] and such other officers as may by said Council be deemed necessary or expedient”

In my opinion the charter has, in the section quoted, conferred ample authority upon the City Council to create the office of Local Transportation Expert.

Section three (3) of said Article provides the method of appointment, confers upon the Council the right to prescribe the duties and define the powers of city officers, and to fix the term of office—with the proviso that the term shall not exceed two years. Said section is:

“Section 3. All officers of any city, except where herein otherwise provided, shall be appointed by the Mayor (and vacancies in all offices except the Mayor and Aldermen shall be filled by like appointment) by and with the advice and consent of the Council. The City Council may by ordinance not inconsistent with the provisions of this Act, prescribe the duties and define the powers of all such officers, together with the term of such office; *Provided*, The term shall not exceed two years.”

The next question that presents itself is: Has the City Council, in creating the office, observed the provisions of the section just quoted? Section 2 of the ordinance provides that the Local Transportation Expert “shall hold his office until removed by the Mayor for cause, such cause to be stated by the Mayor in a written communication to the City Council.” In my opinion this is obnoxious to said Section 3 of Article VI. of the Charter, which provides that “The City Council may, by ordinance . . . prescribe the duties and define the powers . . . , together with the *term* of such office; *Provided*, *The term shall not exceed two years.*”

I suggest that Section 2 of the ordinance be amended so as to read:

“There is hereby created the office of Local Transportation Expert, who shall be the head of the Department of Local

Transportation, and shall hold his office for a term of two (2) years, and until his successor is appointed and qualified."

For the same reasons I would suggest that Section 3 be amended so as to read:

"The Local Transportation Expert shall be appointed by the Mayor, by and with the consent and advice of the City Council upon the adoption of this ordinance or as soon thereafter as may be, and biennially thereafter. If said office shall become vacant by removal, resignation or otherwise, the Mayor shall in like manner appoint a successor."

Section 4 of the ordinance gives authority to the Local Transportation Expert to "employ such clerical and engineering or other expert assistants as the City Council may authorize."

If it is intended that such employment shall be continuous and not temporary or special, the ordinance ought to designate the positions under the jurisdiction of the Local Transportation Expert, and provide for the filling of the same in accordance with the Civil Service Law. If, however, it is intended by said section to authorize the Local Transportation Expert to employ such "clerical and engineering or other expert assistants as the City Council may authorize," contemplating merely a temporary employment specially authorized by the City Council, then the provisions of the Civil Service Law will not apply. The provision for employment of clerks, however, undoubtedly contemplates a continuous employment, and such employment must be in accordance with the provisions of the Civil Service Law. I therefore suggest that Section 4 be amended so as to read as follows:

"There shall be appointed such clerical assistants to the Local Transportation Expert as the City Council may by ordinance prescribe and establish, who shall be appointed by the Local Transportation Expert from an eligible list to be prepared by the Civil Service Commission in accordance with the Civil Service Act and the rules of the Civil Service Commission, and said Local Transportation Expert may, in addition thereto, from time to time employ such engineering or other expert assistants as the City Council may authorize."

Or, if it is the intention of the Council to permanently

employ engineering and other expert assistants, as well as a permanent clerical force, then said Section 4 should be amended to read as follows:

“There shall be appointed such clerical and engineering or other expert assistants to the Local Transportation Expert as the City Council may by ordinance prescribe and establish, who shall be appointed by the Local Transportation Expert from an eligible list to be prepared by the Civil Service Commission in accordance with the Civil Service Act and the rules of the Civil Service Commission.”

Having disposed of the only legal questions that present themselves to me, I respectfully direct your attention to the practical questions suggested by the ordinance, and submit for your consideration certain objections thereto and amendments to remove them.

The ordinance contains no provision for a bond, and I therefore suggest the addition of the following:

“Said Local Transportation Expert, before entering upon the duties of his office, shall execute a bond to the City of Chicago in the sum of five thousand dollars (\$5,000), with such sureties as the City Council shall approve, conditioned for the faithful performance of the duties of his office.”

I also suggest a provision for delivery of property of the city to successor in office, as follows:

“Upon the expiration of his term of office, or his resignation or removal therefrom, the Local Transportation Expert shall forthwith on demand deliver to his successor in office all records, books, reports, papers, documents, maps and plats and all other property belonging to the corporation, or delivered to him by the corporation or any of its officers.”

Very truly yours,

WILLIAM H. SEXTON,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 10, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Your letter in regard to the claim made by James G. Berry against the city upon a judgment he obtained in December, 1900, against the Town of Lake, has been referred to me.

You ask to be informed as to the correctness of the judgment, and if the city is legally bound for the payment of judgments rendered against the various towns prior to annexation.

The city is not bound to pay any judgment rendered against any town prior to the adoption of the Act of 1901, which undertook to abolish township government, unless the City Council, sitting as a Town Board of Auditors of that particular town, passes upon the judgment and allows it as a claim against the town. In such event it will be necessary to pay the judgment. The time fixed for the meeting of the Town Board of Auditors is the Tuesday next preceding the annual town meeting in April, and the Tuesday next preceding the annual meeting of the County Board in September. The Town Board of Auditors is without authority to act on any other day, unless an adjournment to such day is regularly had.

You have no authority to pay interest upon judgments against towns until they have been audited by the City Council.

We have made no inquiry as to the correctness of this judgment. Herewith we return the demand for the payment of the judgment and the letter of the plaintiff's attorneys regarding the same.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 12, 1903.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have before me the letter of Lieutenant John D. McCarthy, of September 21st, 1903, concerning the right of druggists to sell liquor without inquiring the purpose for which it is to be used, and your request for an opinion thereon.

Replying thereto, I beg leave to say that it seems to me that Justice Mahoney was in error in discharging the defendants. Section 1182 of the Revised Code of Chicago, of 1897, reads as follows:

“Any person who shall hereafter have or keep any saloon, tavern, grocery, ordinary, victualing or other house or place within the City of Chicago for selling, giving away, or in any manner dealing in intoxicating liquors in quantities less than one gallon, or who by himself, his agents, or servants shall sell, give away, or in any manner deal in intoxicating liquors, in quantities less than one gallon, or who by himself, his agents, or servants, shall keep a dram shop for the sale of liquors in quantities less than one gallon without a license therefor, in pursuance of this chapter, and other ordinances of the City of Chicago, shall, upon conviction, be fined not less than twenty dollars nor more than one hundred dollars for each and every offense.”

Under this section, anyone selling liquors in quantities less than one gallon, unless he holds a license from the city, is liable to a fine of from twenty dollars to one hundred dollars for each offense. It is incumbent upon anyone claiming to be exempt from the operation of this section, to bring himself clearly within such exemption. If he relies upon a druggist's permit, the burden is on him to show that what he did was authorized by such permit. Such permits authorize the sale of liquors for certain specific purposes only, and unless the seller can show that the liquor sold was sold for one of the purposes specified, then such permit will not avail him as a defense to a prosecution under Section 1182.

However, it is not, in my opinion, worth while to argue this question with the justice, since, under the statement of facts submitted by Lieutenant McCarthy, these defendants

were clearly guilty of violating the provisions of Chapter 23 (Sections 575 to 578 inclusive), relating to druggists. Section 576 provides in substance that:

“Druggists may sell liquor for *medicinal, mechanical, sacramental or chemical purposes only*, not to be drunk upon the premises, upon procuring a permit therefor and paying to the city the sum of one dollar per annum.”

Section 577 provides in substance that:

“Any person, etc., holding such permit shall keep a record of the date of sales of liquors, the amount, the person to whom delivered, except on a written prescription from a licensed physician, which book shall at all reasonable hours be open to the inspection of any member of the police force, whom the Superintendent of Police may designate for that purpose.”

Section 578 provides a penalty for violating any of the foregoing provisions.

A druggist's permit, as before stated, authorizes the sale of liquors for certain specified purposes only. If he sells for any other purpose, such sale is illegal. It would seem to be a self-evident proposition that it is the business of every druggist, selling liquor under such authority, to know the purpose for which it is wanted is one of those authorized. The most obvious way in which he can obtain this information is to inquire of parties desiring to purchase liquor for what purpose it is wanted. If he inquires he may, of course, be deceived by the prospective purchaser, but certainly if he makes no inquiry and no effort to ascertain the purpose for which such liquor is wanted, he is not acting in good faith.

It has been expressly decided that “the sale of liquor by a druggist holding a permit (similar to the one now in question) is legal if he acts in good faith and under such circumstances as are sufficient to create in the mind of a reasonable man a belief that the liquor is bought for the purposes authorized by the permit.” (*Owens v. People*, 56 Ill. App., 570; *Commonwealth v. Josslin*, 158 Mass., 482.)

There are a number of other decisions to the same effect. It has also been held that:

“A druggist, if acting in good faith, may rely on the pur-

chaser's statement as to the purpose for which liquor is wanted." (*People v. Hinchman*, 75 Mich., 587.)

It will thus be seen that it is in every case a question of the good faith of the seller. In my opinion, a druggist who sells liquor indiscriminately to any person applying for the same, and asking no questions as to the purpose for which it is desired, the only condition being that it shall not be drunk on the premises, is not acting in good faith, and furthermore, he is not complying with Section 577, which requires the keeping of a record as hereinbefore described, and by so doing, such druggist renders himself liable to punishment under Chapter 23. I would suggest that these defendants be re-arrested, and booked under Chapter 23.

Yours truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 12, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

In compliance with an order of your honorable body passed at the last Council meeting, I have the honor to transmit you herewith form of ordinance for the submission to the electors of the City of Chicago, of the question of the adoption of the Act entitled "An act to authorize cities to acquire, construct, own, operate and lease street railways and to provide means therefor."

It will be observed that this ordinance fixes the next city election, which falls on April 5th, 1904, as the time for the submission of said Act to popular vote.

The question of whether, under said Act, a special election can be called solely for the submission of said Act before the next city election, has been carefully considered. I have been compelled to the conclusion that the words "special election" in Section 4 of said enabling Act, referred to a special

election duly called for some other purpose. The Act contains no language authorizing the calling of a special election for the submission of the question, and in the absence of such express language the power cannot be presumed. If it be admitted, for the sake of argument, that the question may not be free from doubt, and that the language of the Act may include a special election called for the purpose of submitting the Act to popular vote, yet the mere statement of the existence of a doubt, imperatively requires that an election of such importance as this, an election the legality of which will determine the validity of all further proceedings for the ownership or the operation of street railways by the city, should, even at the cost of some delay, be fixed at a time concerning which no legal question can arise.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 13, 1903.

MR. DANIEL HERLIHY, Secretary Board of Examining Engineers.

Dear Sir:

Replying to your inquiry of the 9th inst., as to whether or not the ordinance of the city is being violated where an engine in the basement of a building on the south side of Adams street is operated by steam generated from two engines located in the basement of a building on the opposite side of the street, and the engines in both buildings are in charge of but one engineer, and none of the engines is exempt from the provisions of the ordinances, I beg leave to advise you that Sections 1931 and 1932, respectively, of the Revised Code, provide in part as follows:

“No steam engine or boiler subject to the provisions of this chapter shall be used, managed or operated in the City of Chicago, except by an engineer or boiler or water tender as provided herein, and who shall have been duly licensed as provided herein, and who shall have and exhibit a certificate thereof.”

“It shall be the duty of the Board of Examiners to see

that each *boiler plant* in the City of Chicago shall have a licensed engineer, or boiler or water tender, or both, as provided herein, in charge at all times when working under pressure, whose certificate of qualification shall be displayed in a conspicuous place in the engine or boiler room, and each engineer and boiler tender shall devote *his entire time*, while boilers are working under pressure, to the duties of the plant under his charge."

While the ordinance does not require the engineer to have a license for any particular plant, it does clearly contemplate that neither a boiler nor an engine shall be without a licensed person in charge at all times while either is working under pressure.

Under the facts stated, it is impossible for one engineer to be in charge of both plants at all times, as required by the ordinance, and I am therefore of the opinion that a licensed engineer is required to operate the engine located in the building on the south side of Adams street.

Yours respectfully,

MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 13, 1903.

MR. DANIEL HERLIHY, Secretary Board of Examining
Engineers.

Dear Sir:

Replying to your inquiry of September 22d, as to whether or not your Board may refuse to issue to a woman an engineer's license to manage a stationary steam plant if she possesses all the qualifications required by the ordinance, I beg leave to say that while in the ordinance the applicant for license is referred to only by a pronoun of the masculine gender, it is not conclusive that such applicant must be of the male sex. The proposition involves two questions: Was it the intention of the Council to exclude women from such an occupation? If so, would such an ordinance be valid?

Words importing masculine gender have frequently been construed by the courts. In the Missouri case of *State ex rel Crow v. Hostetter*, 38 L. R. A., 217, the Court said:

"It is a part of the general law of the State (and was before the time of the present constitution) that where persons are referred to by words importing the masculine gender, females as well as males should be deemed included thereby, unless the contrary intent appears by the context or otherwise. . . . The mere use of the word 'his' in the constitution, in referring to the qualifications of officers, we do not regard as evidencing a purpose to limit the office holding to the male sex."

In the case of *In re Mary Sternberg Thomas*, 13 L. R. A., 538, the Colorado Supreme Court said:

"The use of the masculine pronoun exclusively in the statutes relating to applicants for admission to the bar and to licensed attorneys is not sufficient to show a legislative intent to exclude women from the bar."

In Bouvier's Law Dictionary the pronoun "he" is defined as follows:

"Properly a pronoun of the masculine gender, but usually construed in statutes to include both sexes."

By Section one (1) of Chapter 131 of the Illinois Revised Statutes it is provided that in the construction of statutes, "Words importing the masculine gender may be applied to females."

Section three (3) of Chapter 48 of the Illinois Revised Statutes provides:

"That no person shall be precluded or debarred from any occupation, profession, or employment (except military) on account of sex; *Provided*, That this Act shall not be construed to affect the eligibility of any person to elective office."

In the absence of the above statutory provision, it is doubtful if the ordinance could be sustained as a police regulation if it were construed as excluding females.

Ritchie v. The People, 155 Ill., 98.

Inasmuch as there is not, in the ordinance, an express disqualification of females, and no affirmative statement regarding qualification which does exclude them, and as there is

nothing in the language of the ordinance or in the duties imposed therein which would imply the necessary or intended exclusion of females from such an occupation, I am of the opinion that a woman who possesses the requisite qualifications cannot be deprived of a license on account of her sex.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 14, 1903.

A. J. EDDY, Esq., President Police Pension Board.

Dear Sir:

I have your communication of the 13th inst., requesting an opinion (a) as to whether pensioners under the class enumerated in Section 3 shall continue to receive a pension equal to one-half the amount of salary attached to the rank held on the police force for one year immediately prior to retirement, or shall receive a minimum pension in all cases of not less than six hundred dollars (\$600). And (b) whether beneficiaries under Section 6, namely, widows, or children under the age of sixteen years, shall receive a pension of one-half the salary of the member of the force mentioned in the section, or shall receive in all cases a pension of not less than a minimum of six hundred dollars (\$600).

Regarding the first inquiry, Section 3 provides that any person who shall have served twenty (20) years on the force and after becoming fifty (50) years of age, and after his service shall have ceased, and all officers entitled to and having a pension under said Act to which this is an amendment, after the taking effect of this Act shall be paid from such fund a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement; *Provided, however,* The maximum of said pension shall not exceed the sum of nine hundred dollars (\$900) and the minimum not less than six hundred dollars (\$600).

I am of the opinion that all persons who have served for a period of twenty years, are above the age of fifty years, and whose service on said force shall have ceased, and have become pensioners after May 16th, 1903, in accordance with the provisions of the Act of that date for a "superannuated class", and in addition to these, all pensioners (in whatever class) who have become such after May 16th, 1903, are entitled to and shall be paid a yearly pension equal to one-half the amount of salary attached to the rank which they may have held on said police force for one year immediately prior to the time of retirement, the maximum of said pension not to exceed nine hundred dollars (\$900), and the minimum not to be less than six hundred dollars (\$600).

I am also of the opinion that all officers over the age of fifty years, who have served on the force twenty years and whose connection with the force has ceased, who were on the pension roll prior to May 16th, 1903, are entitled to and should be paid one-half the amount of salary attached to the rank which such person may have held on the police force for one year immediately prior to the time of such retirement, such pension not to exceed nine hundred dollars (\$900).

Touching the inquiry (b), Section 6 provides for two classes of pensions: First, widow and children of an officer losing his life in the performance of duty or from injuries causing death; and, second, widow and children of officer who dies after ten years' service on the force and still in the service of the city as such officer.

Concerning the first class, the provisions of the section are plain that the minimum pension shall be not less than six hundred dollars (\$600), nor the maximum more than nine hundred dollars (\$900).

Concerning the second class, I am of the opinion that there is no minimum established, but that the pension paid shall be one-half the salary of the rank held by the deceased

officer, provided such amount does not exceed nine hundred dollars (\$900).

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 14, 1903.

MR. GEORGE WILLIAMS, Building Commissioner.

Dear Sir:

Answering your letter of October 10th, 1903, as to the legality of the issuance of a permit for the construction of a building to be used in part for the storing of varnish by the Standard Varnish Works at Twenty-seventh street and Armour avenue, I beg leave to say:

Section 211 of the Building Ordinance, so far as is material to the question now involved, reads as follows:

“Buildings designed for the storage of petroleum, or articles of like nature, shall not be less than one hundred feet from any other building, and be constructed as follows, to-wit”:

I understand that the plans disclose that the building is to be constructed in all respects according to the requirements of the ordinance, but that its location is within one hundred feet (to-wit, about sixty feet) from another building. Section 211 is the only section which has application to the class of buildings under consideration, and a permit should not be denied under Section 211 unless you find, as a question of fact, that varnish is an article of like nature with petroleum. If varnish is of such like nature, you should deny the application for permit.

It has been suggested in some of the enclosures submitted with your letter that Section 212, which forbids the storing of turpentine (and other fluids) in certain quantities in any other building than the one constructed in conformity with the provisions of Section 211, applies to this question, since varnish contains turpentine. This question does not arise now.

Said Section 212 has no relation to the erection of buildings. It become a material inquiry only when turpentine is stored in a building not constructed in conformity with the provisions of said Section 211. If that question should arise, however, it would then present a mixed question of law and fact as to whether or not an ordinance prohibiting the storage of turpentine was offended against by the storage of varnish which contained turpentine, and if you should find that varnish contained turpentine in such diluted form that the product was essentially different in its nature from turpentine, particularly with regard to its explosive qualities, the conclusion would follow that the ordinance prohibiting turpentine did not prohibit the storing of varnish; but if, on the other hand, you should find that varnish contained turpentine in such quantities or proportions that the varnish was, in all respects contemplated by the ordinance, substantially equivalent to turpentine in its character as to explosiveness and danger, the conclusion would follow that the prohibition of storing of turpentine applied to the storing of varnish substantially equivalent to turpentine in said respects.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 15, 1903.

HON. F. W. BLAIR, Assistant State's Attorney, Chicago.

Dear Sir:

Replying to your favor of October 7th, requesting an opinion from this department on the question of whether or not paragraph 19 of page 149 of the Revised Ordinances of the Town of Lake, 1887, is still in force, I beg leave to say that the Town of Lake became an integral part of the City of Chicago by virtue of a special election held under the provisions of an Act of the Legislature, which took effect April 25th, 1889.

In the case of *McGurn v. Board of Education*, reported in 133 Ill., page 122, the Court in its opinion, page 131, says:

"By becoming a part of the municipality it (that is to say, annexed territory) is *ipso facto* brought under and made

subject to all the laws by which the municipality itself is governed. Those laws extend over and apply to it *ex proprio vigore* and do not require express legislative action to give them such application. Here the instant the territory in question became annexed to Chicago, it became a constituent part of the city, and from that instant became subject to the same laws, the same municipal organization, and the same policy which the statutes in force had already provided for the government of the city and its institutions."

It seems a reasonable view that the Legislature intended all parts of the same municipality to be subject to the same laws and ordinances, except where it is otherwise expressly provided. It is to be presumed that the Legislature did not intend that different parts of a city should have for their government separate and distinct codes of law. The view of the writer is that it was the legislative intent that as soon as new territory was annexed to the city, and became subject to its laws and ordinances, such laws and ordinances then superseded and displaced the ordinances theretofore in force in such annexed territory, at least so far as ordinances of the general character of that here in question are concerned, except where otherwise specified.

That it was the intention of the Legislature that the police regulations and ordinances which had theretofore been in force in annexed territory should be superseded by those of the municipality to which such territory was annexed, may further be gathered from the fact that the Legislature expressly provided that ordinances in regard to licensing dramshops shall, notwithstanding annexation, continue in force in the annexed territory. This I regard as an interpretation of the Act by the Legislature itself, showing that the dramshop ordinances aforesaid would be regarded by the Legislature as no longer in force after annexation, but for the proviso aforementioned. From this it may be inferred that the Legislature intended that all such police regulations and ordinances as were not expressly excepted should cease to be in force after annexation. (Chapter 24, Starr & Curtis' Annotated Statutes, Paragraph 235.)

For the reasons stated, I am of the opinion that the ordinance above referred to is no longer in force.

Yours truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 19, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have your communication of the 6th inst., asking for an opinion as to whether a provision in specifications, constituting a part of a contract, which limits the labor performed upon a public work in this city to a day of eight hours can be enforced by the city.

This question involves the legality of the specifications mentioned. If the specification is illegal, it cannot be enforced.

It seems to be the settled doctrine of the court of last resort in this State that a provision in specifications attached to a public contract is void, which, after prescribing that eight hours shall constitute a day's work, makes the contractor liable to forfeiture of the contract if he allows his men to work more than eight hours, since it infringes the right of free contract.

Fiske v. People, 188 Ill. 206.

The contract in question contains such a provision for forfeiture.

In the *Fiske case* it is said:

"That part of this clause in the specifications, which makes the contractor liable for a forfeiture of his contract, if he allows laborers or employes to work more than eight hours in one day, is unquestionably void and unconstitutional. It infringes upon the freedom of contract to which every citizen is entitled under the law. (*Ritchie v. People*, 150 Ill. 98.)

In *Glover v. The People*, 201 Ill. 549, the court in speaking of a provision similar to the one in question say:

“Whenever these provisions have been presented to us, whether in statutes, ordinances or contracts, we have not hesitated to pronounce them void.”

In *McChesney v. The People*, 200 Ill. 146, the court characterized a provision or restriction in a competitive bidding as unlawful and against public policy.

The cases quoted were special assessment cases appealed to the Supreme Court either from judgment of confirmation or judgment of sale, and the illegality of similar provisions in contracts were urged by the objecting property owners, on the ground that a restriction of competitive bidding would necessarily increase the cost of the work, and consequently the burden of the person assessed. The court in every case assented to this contention of the objector, that a property owner was entitled to have the work done at the lowest cost, and in the *McChesney case*, *supra*, this view is expressed as follows:

“It is a material and important right of the property owner that there shall be free and open competition, unrestricted by illegal and unconstitutional provisions, the natural tendency of which would be to increase the cost of the work, and it is undeniable that the clauses in question in this case lay down rules which would naturally increase such cost and be detrimental to the public.”

Wells v. People, 201 Ill. 435, 441;

Sweet v. People, 200 Ill. 536.

The increase of cost and detriment to the public, I take it, would be equally great whether the work contracted for was the pavement of a street or, as in the present case, the construction of an intake for the sewers. In either case the contracts are let upon public and competitive bids.

In the case of *State of Missouri v. W. H. Loomis, et al.*, 115 Mo. 307-21 L. R. A. 789, the defendants were tried upon an information filed for issuing a check in payment of wages of labor, in violation of the statute prohibiting mining and manufacturing concerns from issuing for the payment of wages any order or other evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same is negotiable and redeemable without discount in cash or in supplies at the option of the holder. This statute

is held void as depriving persons of liberty as guaranteed by the constitution, which includes the right to freely buy and sell, *make contracts* and have them enforced as others may.

In the case of *Commonwealth v. Perry*, 155 Mass. 117, 14 L. R. A. 325, the court held that the statute which provided that "no employer shall impose a fine upon or withhold the wages or any part of the wages of an employe engaged at weaving for imperfections that may arise during the process of weaving," violated the State constitution which declared the inalienable rights "of acquiring, possessing and protecting property" since this included the right to make reasonable contracts.

In the case of *United States v. Martin*, 94 U. S. 400, the Federal eight hour law is discussed, and it is there held that the law is a direction merely to the employer designating what a day's work should properly be, but does not restrict the right of the employer to engage labor for a period longer than eight hours, nor the right of the employed to work longer than eight hours, if the parties so agree by separate contract. Martin had worked for the government twelve hours a day for a considerable time, and sought payment for all time over eight hours per day, but had made no protest to the extra work. The court held that if the claimant wished to contract with the government for twelve hours' work per day, he could do so under the eight hour act, but that having done so and accepted pay without protest for several years, he could not claim that his daily work should have been restricted to eight hours, or that all work performed outside of this period should be counted extra work and paid for accordingly.

To the same effect is the case of *United States v. Timmonds*, 84 Fed. Rep. 933.

In ex parte Kubach, 85 Cal. 274, the validity of an ordinance was questioned which provided that "eight hours labor constitutes a legal day's work" where the same is performed under a contract with the city; and that any one engaged in performing such a contract who "shall demand, receive and contract for more than eight hours' labor in one day" from any person or who shall employ Chinese labor, shall be guilty of a misdemeanor and subjected to a fine. The ordinance was

held unconstitutional and void as an attempt to prevent persons from employing others in a lawful business beyond certain limits.

In re Eight Hour Law, 21 Col. 29, a bill prohibiting mining and manufacturing companies from contracting with their employes for labor for more than eight hours a day, is in violation of the right of parties to make their own contracts under the Constitution of the United States (Fourteenth Amendment) and the Bill of Rights of the Constitution of the State.

In *Low v. Rees Printing Company*, 41 Neb. 127, a law providing that for mechanics and laborers a day's work shall not exceed eight hours, and that for work over such time the employer shall pay extra compensation, is unconstitutional because it denies persons the right to contract as to compensation for services.

In *Wheeling Bridge and Terminal Railway Co. v. Gilmore*, 8 Ohio Circuit Court Rep. 658, an act declaring that ten hours shall constitute a day's work for certain classes of railroad employes, and that for any time in excess thereof that any such employe shall work under the direction of a superior or at the request of the company, he shall be paid in addition to his per diem, is in conflict with Constitution, Article 1, Section 1, declaring it an inalienable right of all men to acquire, possess and protect property.

People v. Phyfe, 20 N. Y. Supp. 461, held that an act to provide for and limit the hours of service on railroads, providing that ten hours' work in twelve consecutive hours shall be a day's labor, and if employed longer than that the employe shall receive proportionate compensation for the extra service, but not prescribing any rate of wages, nor prohibiting contracts other than by the day, and making violation thereof on the part of the railroad companies or their agents a misdemeanor, is not unconstitutional in a case where there is no express contract to the contrary.

In *People v. Warren*, 77 Hun. 120, a law providing that contractors for city works shall not accept more than eight hours for a day's work, or employ a man for more than eight hours in twenty-four consecutive hours, except in the case of

necessity does not abridge the privileges of citizens within the inhibition of the constitution of the United States.

In *State v. Goodwill*, 33 W. Va. 179, it is held that legislation prohibiting mine owners and manufacturers from making contracts with their employes, which it is competent for other employers of labor to make, cannot be sustained as an exercise of police power.

In *Braceville Coal Company v. People*, 147 Ill. 662, the court say :

“There can be no liberty protected by government which is not regulated by laws which will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject to the restraints necessary to secure the same rights to all others. The fundamental principle upon which liberty is based in free and enlightened governments, is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the Constitution, means not only freedom of the citizen from servitude and restraint but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. *Fraser v. People*, 147 Ill. 171; *Commonwealth v. Perry*, 155 Mass. 117; *People v. Gillson*, 109 N. Y. 389; *Slaughterhouse cases*, 83 U. S. 36; *Godcharles v. Wigeman*, 113 Pa. 431. Property in its broader sense is not the physical thing which may be subject to ownership, but is the right of dominion, possession and power of disposition which may be acquired over it. And the right of property reserved by the Constitution is the right, not to possess and enjoy it, but to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And as an incident to the right of acquiring property the liberty to enter into contracts by which labor may be employed in such way as to the laborer may seem most beneficial, and of others to

employ such labor, is necessarily included in the constitutional guaranty."

In re Thomas A. Morgan, 47 L. R. A. 52, the Colorado Supreme Court in deciding the constitutionality of the statute making it unlawful to work more than eight hours per day in mines or smelters, held the statute to be in violation of the State Constitution guaranteeing liberty and the right to acquire, possess and protect property. It also held that a decision of the Supreme Court of the United States holding that an eight hour law of a certain State did not violate the federal constitution was not binding on the courts of another State in favor of the validity of such law under the constitution of that State.

I am therefore of the opinion that this specification attached to and made a part of a contract for public work, awarded by competitive bidding, is illegal and void, and that the city cannot force contractors to adopt an eight hour day under such contracts.

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 20, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I acknowledge receipt of your letter of the 16th inst., asking whether a fruit dealer who rents a door or portion of a window in a hotel, saloon or other business place, is an occupant of the building, so as to be entitled to occupy three feet next to the lot line of the premises, under Section 1837 of the Revised Code; or whether you can compel the removal of such stands under the council order of January 20, 1902, which is as follows:

"Ordered, That the Commissioner of Public Works, Superintendent of Streets and the Commissioner of Buildings be and they are hereby directed and instructed to at once clear

dewalks all booths and stands, and to enforce the
 ace which requires occupants of buildings to keep
 e feet of the building line."

ection 1837 is as follows:

Storage on street, alley or sidewalk.] No street,
 ewalk shall be used for the storage of goods, wares
 idise of any kind or description whatever which
 py a greater space than three feet next the build-
 boundary line of his or her lot. If any person shall
 place or cause to be placed in or upon any street, alley or
 sidewalk any barrel, box, hogshead, crate, package or other
 obstruction of any kind or description whatever which shall
 take up more space than three feet next to the building or
 the boundary line of the lot, and shall suffer the same to re-
 main thereon more than two hours, he shall be subject to a
 fine of not less than five dollars nor more than ten dollars,
 and any policeman or public officer shall be empowered to
 cause the same to be removed at the expense of the party
 placing the same there, and the said party shall also be sub-
 ject to a fine of one dollar an hour for each and every hour
 that said goods, wares, merchandise or other obstructions
 remain there after the expiration of two hours."

This ordinance is intended to give bona fide occupants
 of buildings a space to display their wares, and it does not con-
 template that the sale of such wares may be made on the public
 sidewalk.

As you know, a large part of the sales of fruit dealers,
 whether occupants of an entire store or only a portion thereof,
 are made from the goods displayed on the sidewalk. It is
 apparent that the renting of a doorway or window is a mere
 subterfuge, resorted to by the dealer to bring himself within
 the provisions of said Section 1837. Even though this were
 sufficient, which I deny, it would not authorize him to make
 sales from the sidewalk.

However, Section 1839 of the code expressly forbids the
 erection of a stand on the sidewalk for the sale of fruit. This
 section is as follows:

"1839. Stands for fruit and merchandise.] No person
 shall erect any booth or establish or fix any stand for the sale

of fruit, books or other merchandise, or any article or thing of value whatever, encumbering any part or portion of the streets or sidewalks, under the penalty of not more than five dollars for each offense."

Therefore, I am of the opinion that you need not rely upon the above mentioned council order or upon said Section 1837 for your authority to remove such stands from the sidewalk, as said Section 1839 covers the point, and you may proceed thereunder at any time.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 23, 1903.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your verbal inquiry of yesterday, with regard to the extent of the city's power to regulate and control the transmission of racing news by telegraph companies, I beg leave to say:

Telegraph companies are given, by the act of Congress of 1866, Title, LXV, Section 5263), the right to construct, maintain and operate lines of telegraph over and along the post roads of the United States. Under this grant of power, the Western Union and other telegraph companies, when sought to be controlled by local authorities, have set up this federal privilege as an immunity from local supervision. In this position, however, the telegraph companies have been uniformly unsuccessful, and without exception the courts have held that the exercise of the federal rights were subordinate to the reasonable control and regulation of the local authorities.

Judge Drummond held, in the case of the *Mutual Telegraph Company v. City of Chicago*, 16 Fed. Rep. 314, that, notwithstanding the rights given by the act of Congress, the power of the city still exists to regulate and control the man-

ner in which telegraph lines shall enter or pass through the city, and in this case the action of your father (when Mayor of this city) in cutting the wires of a telegraph company which refused to put its wires under ground, was sustained.

The Federal Court also very recently decided (March 9, 1903), in a Toledo case, that a telegraph company had no right to string its wires without making application to and receiving permits from the local authorities for that purpose. *W. U. T. Co. v. City of Toledo*, 121 Fed. Rep. 734.

Practically the same question was decided in New York, where the action of the Commissioner of Public Works of that city was sustained, in causing poles to be cut down and wires removed on account of the failure of a telegraph company to put its wires under ground. *American Rapid Telegraph Company v. Hess*, 125 N. Y. 541.

It has also been held that the right to maintain and operate telegraph lines does not embrace the maintenance of call boxes for messenger service. *Toledo v. W. U. T. Co.*, 52 L. R. A. 730 (U. S. Circuit Court of Appeals).

An automatic ticker service for the furnishing of racing news, is, in my opinion, still farther from the natural scope of a telegraph company's business than the maintenance of a district messenger service.

It has also been held that the municipality had the right not only to prevent the construction of telegraph lines without a permit, but that it had a right to impose a tax for each pole erected in the public streets. *Postal Telegraph Cable Company v. Mayor, etc., of Baltimore*, 24 L. R. A. 161.

Such a tax, however, must be limited to fair compensation for such portion of the public streets necessarily appropriated and occupied by the company's poles or other instrumentalities of business which encroach upon the public space. This tax has been sustained in Pennsylvania at five dollars for the installation of each pole and one dollar per pole per year thereafter, and two dollars and a half per mile for wire, not as a tax, but as a license fee under the police power of regulation. The differences between the Maryland and Pennsylvania courts in this regard are in reality mere verbal differences. There is no essential difference of principle, but at the

most, telegraph companies are not entitled to exemption from the payment of just compensation for the use of the public streets; and even if it be admitted that a license fee cannot be charged for telegraph business, there can be no doubt whatever that automatic ticker service is subject not only to payment of compensation for that part of the public property used by it, but is also subject to regulation under the police power and may be required to take out a license for each ticker.

Your suggestion in reference to the passage of an ordinance requiring the taking out of licenses for tickers, and the incorporation in the ordinance of rules against the transmission of racing news, betting odds or other gambling information, is in absolute accordance with the law, and I have no doubt that your plan can be successfully carried out.

The companies are now operating this ticker service without any authority of law whatever, so far as the printed volume of the ordinances show, and their lines can be cut without notice. Before taking any such steps, however, I would suggest that a reference be made to the electrical department to ascertain whether or not any permits have been issued for the stringing of wires connected with the ticker service, or whether there are council orders, resolutions or ordinances touching the matter, not printed in the official volume of ordinances.

Yours very sincerely,

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 26, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At your last meeting you directed me to submit to your honorable body, within two weeks, an opinion "determining" the following questions:

(1) Are there any legal obstacles which could be used to prevent the submitting of a franchise ordinance to the

voters, if the council should direct that such ordinance be submitted?

(2) Could the Election Commissioners legally refuse to print such proposition on the ballot, or in other manner refuse to submit such franchise ordinance to the voters, if the City Council should decide in favor of said submission?

It will be observed that these questions are presented in the abstract, and that there is a total absence of that definiteness of detail which is necessary for a precise answer to a concrete proposition. Accepting the questions, however, as mere abstract propositions, I answer both interrogatories in the negative, with this proviso: that the question be submitted in either case in one of the methods now established by law.

Eliminating the Mueller Street Railway Law, which has not yet been adopted in the City of Chicago, there are but three ways for the submission of general questions to popular vote: One, the question of the issuance of bonds controlled by Section 3, Ch. 113, R. S. Ill.; another, constitutional amendments or other public measures governed by Section 303, Ch. 46, and Sections 9, 10 and 11, Ch. 7a, R. S. Ill., and Article XIV of the Constitution of 1870; the third, an expression of opinion by electors on questions of public policy governed by Sections 428 and 429, Ch. 46, R. S. Ill., known as the "Public Policy Act."

Your questions refer to "franchise ordinances." Assuming by this expression that you mean an ordinance of the City Council granting to a person or corporation the right to operate street railways in the public streets, it will be seen that none of the statutory provisions above referred to, except the last, authorize the submission to popular vote of the question of whether or not such an ordinance should become a law. Such ordinance at the present time could only be submitted to popular vote under the authority of the said "Public Policy Act", and must be founded upon a written petition signed by twenty-five per cent. of the registered voters of the city.

Very respectfully,
 EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 27, 1903.

CHARLES ALLING, ESQ., Alderman, Second Ward.

Dear Sir:

Your request of October 2, 1903, that this office draft an ordinance giving to the Anti-Cigarette League a percentage of license fees and fines from the sale of cigarettes, has been referred to me, and by direction of the Corporation Counsel, I have made an investigation to determine whether or not such an ordinance would be valid.

If the council has power to pass an ordinance of this character, we must look for such power among those expressly granted to it by the legislature, or necessarily implied from those granted.

In the "General Act for the Incorporation of Cities," etc., Revised Code of Chicago, 1897, page 516, are found the following provisions:

"2229. Suits for violating ordinances.] Sec. 5. All actions brought to recover any fine, or to enforce any penalty, under any ordinance of any city or village, shall be brought in the corporate name of the city or village, as plaintiff; and no prosecution, recovery or acquittal for the violation of any such ordinance, shall constitute a defense to any other prosecution of the same party for any other violation of any such ordinance, although the different causes of action existed at the same time, and, if united, would not have exceeded the jurisdiction of the court or magistrate.

"2230. Fines and licenses—paid to treasurer. Sec. 6. All fines and forfeitures for the violation of ordinances, when collected, and all moneys collected for licenses or otherwise, shall be paid into the treasury of the corporation, at such times and in such manner as may be prescribed by ordinance."

By Section 2225, Clause 2, the City Council is given power:

"To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation."

It will be seen, therefore, that all license fees and all fines

are to be paid into the city treasury, and can only be paid out for a *corporate purpose*.

It thus becomes necessary to determine whether or not money paid out under the proposed ordinance would be paid for a corporate purpose.

It has been said that it is easier to decide what is not a corporate purpose than what is such a purpose. A "corporate purpose" has been judicially defined as:

" . . . some purpose which is germane to the general scope of the object for which the corporation was created, or such as has a legitimate connection with the object or a manifest relation thereto."

Weightman v. Clark, 103 U. S. 256;

People v. Dupuyt, 71 Ill. 651.

In these cases it was decided that school trustees have no power to vote aid to a railroad company.

In *Taylor v. Thompson*, 42 Ill. 9, a corporate purpose is said to be one "which shall promote the general prosperity and welfare of the municipality." In this case it was held that a tax levied by the municipality to pay bounties to persons volunteering for service in the civil war was proper, but in *People v. Dupuyt, supra*, the court says of the decision last above quoted:

"But in that case, a vote of the people authorizing the tax was first to be taken and the people had voted the tax. This was an important fact in determining the case, and the court went far enough in upholding this tax."

The legislature at one time passed an act requiring the City of Chicago to pay over to the "Washingtonian Home" a portion of its receipts from liquor licenses. In an opinion dated June 29, 1893, by C. S. Darrow, then Assistant Corporation Counsel, approved by Adolph Kraus, then Corporation Counsel, it was held that this statute was unconstitutional and void, and as contravening the rule that appropriations must be for corporate purposes only. That opinion was subsequently confirmed by the Supreme Court in the case of *Washingtonian Home v. City of Chicago*, 157 Ill. 414, and the court, in its opinion, says:

"The revenues of the City of Chicago, arising from

licenses, from taxation and from all other sources, are owned by the city and held by it in trust, to be used for corporate purposes which are lawful, and the revenues of a city cannot be diverted to any other purpose. The revenues of a city cannot be donated by the officers of the city or by the City Council to any person they may think entitled to the same, but, on the other hand, such revenues can only be paid out or appropriated by the City Council or its officers in the manner and for the purposes authorized by law. Where the lawful power does not exist the payment is unauthorized and void."

If the council had power to pay over money to the Anti-Cigarette League, it would have the same power to pay it to any other association, individual or institution, and there would be no reason why all the money collected in this manner might not be paid out to various institutions or associations provided the City Council considered them sufficiently worthy. It matters not that the object for which the Anti-Cigarette League was formed and is maintained may be a very worthy one; it is a purely private institution, and as such, the council has not, in my opinion, the power to direct the payment to it of any public moneys.

I have carefully considered whether an ordinance might be framed giving to the League a part of the fines collected through its instrumentality for the violation of the cigarette ordinances, on the theory that is something held to justify a reward to an informer, but here, again, we are confronted by the question of whether or not the city has power to offer or pay such rewards. No such power is anywhere expressly granted to the city, and none from which it is necessarily implied.

"It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

Minturn v. Larne, 23 How. 425;

Industrial School v. Brown, 45 Md. 332.

It has been held in this State that a county has no power to offer rewards for escaped criminals, except for horse thieves, the exception having been authorized by the legislature.

Crawford v. Spenney, 21 Ill. 288.

Although the question of whether or not a municipality, in the absence of express statutory authority, has power to offer rewards for the apprehension of criminals has not, so far as I have been able to learn, been passed upon by the courts of this State (except as above noted), yet it has been the subject of decisions in other States, and the great weight of authority is opposed to such power.

15 A. & E. Ency. of Law, 1053-1054.

For the reasons stated I am of the opinion that the proposed ordinance would be invalid.

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 27, 1903.

MR. EDWARD B. ELLICOTT, City Electrician.

Dear Sir:

I acknowledge receipt of your letter of June 25, asking whether the Chicago & Milwaukee Telegraph Company has any right to erect and maintain telegraph lines in the City of Chicago, and whether that right exists by virtue of a city ordinance, an act of the legislature, or an act of Congress; also the scope of the ordinance on page 1853 of Volume 2, Special Ordinances.

In addition you ask whether this company has a right, without an ordinance from the city, to erect and maintain a cable, enclosing several wires, along the structure of the "Alley L" railway company, from which it has strung wires to tickers in saloons, hotels, race tracks and different resorts

on the south side, and in which cable it has also placed two telephone wires used by said railroad company for the latter's private business.

Subsequently you made a verbal request for an opinion as to whether all telegraph companies must procure an ordinance as required by Section 1902 of the Revised Code.

On July 24, 1866, Congress passed a law known as the "Post Roads Act", giving to any telegraph company, then or thereafter organized under the laws of any State, the right to construct, maintain and operate lines of telegraph, through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, or which had been or should thereafter be declared to be such by law, and over, under or across the navigable streams on waters of the United States.

By an act of Congress passed in 1872, all railroads and all letter-carrier routes in any city or town, were expressly declared to be post roads; and by a subsequent act of March 1, 1884, all public roads and highways were declared to be post roads.

Joyce on Electric Law, Sec. 38.

Keasbey on Electric Wires, Sec. 177.

Congress derives this power from the Constitution, and the object of vesting it in Congress was to secure uniform regulations against conflicting State legislation, and this applies to telegraphic interstate communications.

"The Post Roads act" applies to then existing telegraph companies and to all those thereafter organized and electing to accept its provisions.

Joyce on Electric Law, Sec. 49.

Since the passage of the "Post Roads Act" telegraph companies have made broad claims of exemption from control by State and municipal legislation, and the question has been the subject of litigation in many of the large cities of the country, chiefly New York, Philadelphia, St. Louis, Baltimore and Toledo.

While a State or municipality has not the power to exclude telegraph companies when they claim the benefit of the "Post Roads Act" and have complied with its provisions,

still such companies are amenable, within lawful limits, to the police power of the State or municipality which they have entered for the purpose of constructing their lines; and they must submit to all proper and reasonable regulations of the local government with respect to the use of streets.

Joyce on Electric Law, Sees. 50 and 63.

In the case of *City of St. Louis v. Western Union Telegraph Co.*, 148 U. S. 100, the Supreme Court said:

"It is a misconception to suppose that the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public and private rights."

In the case of *City of Toledo, et al. v. Western Union Telegraph Company*, 52 L. R. A. 730 (March, 1901), decided by the United States Circuit Court of Appeals, the telegraph company claimed that it was not necessary for it to obtain the consent of the municipality to occupy the streets, and that it was under no obligation to obtain permits to put in new construction and do the work under the direction of the city civil engineer and superintendent of fire-alarm telegraph. The court said:

"We think, however, in the use of these streets and alleys, although it had accepted the terms of the statute of 1866, the complainant was subject to the control of the municipality, and could not, in defiance of its reasonable regulations, erect poles and stretch wires without let or hindrance. It is necessary for its fire protection, and a proper knowledge of the obstructions in its streets, and the use to which its public places are being subjected, for the city to know, before any construction is put in, what is contemplated, and to have the work done under the supervision of its officers; and the complainant is no more exempt from such restrictions than any other corporation rightfully occupying the streets and alleys of the city."

In the case of *Western Union Telegraph Company v. Mayor of New York, et al.*, 3 L. R. A. 449 (April, 1889), decided by the United States Circuit Court for the Southern District of New York, the court said:

"The privilege to maintain telegraph wires 'over and

along' post roads is not to be construed so literally as to exclude regulations by the State respecting location and mode of construction and maintenance, which the public interests demand; but is to be construed so as to give effect to the meaning of Congress, which was to grant an easement that would afford telegraph companies all necessary facilities, and which to that extent should be beyond the reach of hostile legislation by the States. Thus interpreted, the grant is no more invaded when the regulation requires the wires to be placed in conduits under ground than it would be if they were required to be placed in conduits along the surface of the streets; and when this becomes necessary for the comfort and safety of the community such a regulation is as legitimate as one would be prescribing that the poles should be of a uniform or designated height, or should be located at given distances apart, or at designated places along the streets."

"The reports of the decisions of the Supreme Court abound with cases illustrating the rule that all local arrangements and regulations respecting highways, railroads, bridges, canals, ferries, and wharves within the State, their location, supervision and details of management, though materially affecting commerce, both internal and external, and thereby incidentally operating measurably upon the transaction of interstate commerce, are within the power and jurisdiction of the several States. When the regulations do not act upon the commerce through the local instruments to be employed after coming within the State, but directly upon business as it comes into the State from without, or goes out from within, they are nugatory; otherwise they are valid."

By Clause 17 of Article V of the Cities and Villages Act, the city is empowered "to regulate and prevent the use of streets, sidewalks and public grounds for . . . telegraph poles."

By Section 4 of Chapter 134 of the Revised Statutes of Illinois, it is provided that no telegraph company shall have the right to erect any poles, posts, piers, abutments, wires or other fixtures of their lines upon any street, alley or other

highway or public ground within any incorporated city, town or village, without the consent of the corporate authorities of such city, town or village, and that such consent must be in writing and be recorded in the recorder's office of the county. Construed literally, this section of the statute prohibits the erection of poles and wires without the consent of the corporate authorities of the city, and would have the effect of depriving telegraph companies of the benefit of the "Post Roads Act"; but the proper and reasonable interpretation to be put upon this section is that it grants express power to the city to regulate the operations of such companies, and such grant is in addition to the police power grant.

Section 1902 of the Revised Code of Chicago, amended March 28, 1898, provides as follows:

"No person, firm or corporation shall erect, construct or put up any pole, line or wire, or electric conductor of any description whatever within the limits of the City of Chicago, without first having obtained a permit therefor, under a valid and existing ordinance, from the Commissioner of Public Works, which permit shall be countersigned by the City Electrician, under a penalty of \$100 for each and every offense; and each and every day any such telegraph pole, line or wire, or electric conductor, shall be continued and maintained after the first conviction shall constitute a new and separate offense."

In the case of *Western Union Telegraph Company v. Mayor of New York, et al., supra*, the company sought to enjoin the municipal authorities of New York City from interfering with its telegraph wires and from compelling them to be put under ground.

The court held that the Manhattan Elevated Railway Company was, in legal contemplation, an independent post road of the United States, and the municipal authorities had no power to require the telegraph company to remove its wires altogether from the structure of that road, or to refuse to permit them to be kept there under any circumstances, as such an act would be equivalent to a complete denial of the privilege granted by the act of Congress. The court admitted, however, that its view of that phase of the case was not free

from doubt, and ruled in favor of the complainant for the purpose of granting it temporary protection.

The *Toledo case, supra*, was again appealed to the United States Circuit Court of Appeals, 121 Fed. Rep. 734 (March, 1903), and the court said:

"Upon the former appeal in the present case, our judgment reversing the order of the Circuit Court in the end turned upon the question whether the telegraph company, upon the case stated in the bill, was bound to make application to the Common Council for a permit before it could lawfully construct its projected works; and we held that it was so bound. What has since been done by the telegraph company in no wise relieves it from that obligation."

In the case of *American Rapid Telegraph Company v. Hess*, 125 N. Y. Court of Appeals, 641, the plaintiff contested the right of the City of New York, under an act of the legislature, to require its wires to be placed under ground. The court said:

"Its (the telegraph company's) property was not taken for public use; it was simply removed from the streets where it had become a nuisance and the public authorities had the same right to remove it from the streets, doing no unnecessary damage, that it had to remove any other encumbrance therefrom. After the passage of the acts referred to, and the building of the subways and the notice to the plaintiff, it had no right longer to maintain its poles and wires above the surface of the streets. They were then there without authority and thus became a nuisance, and hence the public officials had a right to remove them."

Further on, in speaking of the acts of Congress, the court said:

"The precise scope and range of operation of these sections within a State are not quite apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the State, except under regulations prescribed for the control of all telegraph companies within the State, nor could such companies interfere with streets and highways in the State so as materially to impair

their usefulness as ordinary highways. Nor could these congressional acts deprive the State of its control over its highways, and its right to regulate their use under the police power for the public welfare. The laws of Congress are perfectly satisfied by the permission granted to the plaintiff, of which it is perfectly feasible for it to avail itself to place its electrical conductors in the subways constructed beneath the surface of the streets."

The ordinance required under Section 1902 would be a mere regulating ordinance prescribing reasonable conditions for the erection and maintenance of poles and wires and specifying the various details of construction, thus giving the City Council a voice in their determination. This appears to be the whole scope and design of said section, and it is plainly not unreasonable.

Counsel for the telegraph company asserts that under the ordinance granted to the Chicago and South Side Rapid Transit Railroad Company, page 953 of Special Ordinances, the railroad company has the power to string telegraph wires on its structure; that said road is a post road, and as the telegraph company has the power, under the act of Congress, to string wires on all post roads, it is not necessary for the telegraph company to do more than obtain the permission of the railroad company to string such wires, and that it is under no obligation to obtain the permission of the city to do so.

This position is not tenable, and is not supported by the authorities; neither does the ordinance give the railroad company any power to make such a contract, as it expressly provides in Section 1 that the telegraph devices it may use must be "for the sole use of said company"; and Section 7 of the ordinance provides as follows:

"The rights and privileges hereby conferred are upon the further express condition that said elevated railroad shall be exclusively used for the transportation of passengers and mails."

Therefore the telegraph company's right so to maintain its wires cannot be derived from the railroad company, and as the authorities hold that the act of Congress does not relieve it from a compliance with the reasonable regulations of

municipalities, it follows that the telegraph company cannot maintain the wires on the elevated structure without permission from the city.

Again, assuming that the city has not control over telegraph wires so situated, and that under the authority of the New York decision referred to above the elevated railroad company is a post road, nevertheless I am of the opinion that you have the power to remove the said cable from the structure of the elevated road, because it is not maintained solely for telegraphic purposes, but also contains telephone wires for the private use of the railway company, which is not within the privilege granted by Congress to telegraph companies.

City of Richmond v. Southern Bell Telephone & Telegraph Co., 174 U. S., 761.

I am of the further opinion that no telegraph company has the right to erect any pole or wire in this city without first having obtained permission from the City Council so to do, under said Section 1902 of the Revised Code. The city has not the power, however, to exclude such companies or to eloge the consent with unreasonable conditions.

Mutual Union Telegraph Co. v. City of Chicago, et al., 16 Fed. Rep. 314.

With reference to the right of the telegraph company to string wires in buildings, the court in the *Toledo case*, *supra*, said:

"We are also of the opinion that the Western Union Telegraph Company had no right, under the privileges granted to it by the act of 1866, to install a district telegraph system in the City of Toledo, as that act only extended its privileges to the business of telegraph companies. A district telegraph business, as disclosed by this record, consists in securing the attendance of messenger boys to carry telegraph messages, run miscellaneous errands, carry packages, distribute posters, invoices, invitations, etc. The business also includes night watchman signals, fire and burglar alarms, and police calls."

I am of the further opinion that none of the telegraph companies doing business in Chicago has any right, without first complying with Section 1902 of the Revised Code, to

string wires in any buildings, for calling messengers, operating electric clocks, police calls, tickers, etc.

The only authority possessed by the Chicago & Milwaukee Telegraph Company to erect and maintain a telegraph line within the limits of the City of Chicago, is by virtue of the ordinance granted July 3, 1878, by the board of trustees in the Town of Lake View, referred to in your letter, and such authority is limited to the streets therein named.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 27, 1903.

MR. JAMES B. GALLOWAY, Chairman River Improvement Committee, Chicago Real Estate Board.

Dear Sir:

Your favor of October 5, 1903, requesting information from this department relative to the "limitations and conditions of the leasehold interests in the La Salle and Washington street tunnels, held by the street railway companies," is before me. Replying thereto, I beg leave to present herewith the information desired:

WASHINGTON STREET TUNNEL

The Chicago Passenger Railway Company, by ordinance passed February 1, 1886, amended February 8, 1886, and accepted March 8, 1886, was granted, among other things, the use of the Washington street tunnel for a single or double track railway; the term of the grant is twenty years; the grantee is required, among other things, to so lay its tracks and operate its cars, as not to unnecessarily delay public travel; to keep eight feet in width where single tracks are laid and sixteen feet in width where double tracks are laid, paved and in good repair. Animal power only to be used.

Subsequently, an ordinance was passed, to-wit, on March 30, 1888, giving said Chicago Passenger Railway Company the right to substitute electric or cable power for animal power

on all lines. The rights acquired under the foregoing ordinances, presumably, were subsequently transferred to the West Chicago Street Railroad Company and later to the Chicago Union Traction Company, which latter company presumably owns or leases the same at the present time.

LA SALLE STREET TUNNEL

By ordinance passed July 19, 1886, accepted October 11, 1886, the North Chicago Street Railroad Company was granted the right to construct and operate a double track street railway through the La Salle street tunnel. The term of the grant is twenty years. Grantee is required to make new roadway of tunnel, as required by council, pave and light the same and light footway; keep free from water and well ventilated; keep walls of carriage and footway well painted and maintain tunnel in good condition. Grantee required to pay (1) \$25,000 per annum, or (2) a sum of money sufficient to erect over the river at Clark street, a new four-track iron bridge, similar to that at Rush and Lake streets, to be operated by steam power, and \$10,000 per annum, or (3) the sum of money for the bridge as per option 2, and also a sum of money sufficient to erect a similar bridge at Wells street.

Rights under the above ordinance are now, presumably, owned or leased by the Chicago Union Traction Company.

The foregoing are all the rights in the two tunnels mentioned now held by street railway companies, so far as I have been able to learn.

Yours respectfully,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 29, 1903.

HON. CARTER H. HARRISON, Mayor of Chicago.

Dear Sir:

In reply to your letter of October 27th, in which you ask for an opinion as to whether or not the city can lawfully

engage in the business of crushing stone, said stone to be used in the building of its streets and its city work exclusively, I have the honor to say:

Clause 7 of Section 1 of Article V of the Cities and Villages Act gives the City Council power "to lay out, to establish, open and alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same." There are numerous other sections which authorize the city to construct and erect and keep in repair bridges, viaducts and tunnels, culverts, drains, sewers, cess-pools, canals, slips, landing places, wharves, docks, levees and other similar structures. In nearly all of these broken stone may properly be used. Clause 86 of said section and article gives power "to provide for the erection and care of all public buildings necessary for the use of the city or village." Clause 96 gives power "to pass all ordinances, rules and make all regulations *proper or necessary to carry into effect* the powers granted to cities or villages, . . ."

There can be no doubt that the city has the power to grade and pave its streets. Granted this power and it logically follows that the city may do any act or thing involving the exercise only of a part of that power, and that it has the power to perform every act necessary to the carrying out of the main object, or of any essential part thereof.

Crushed stone is the principal element in the construction of macadam, brick and asphalt pavement and is used also as the foundation of other kinds of pavements, such as creosoted block.

In 1877 the city presented a similar question to the Federal Court. In the opinion in that case, Judge Drummond said:

"By its charter the city had authority to light the public streets, and it is to be inferred the public buildings and offices, and to levy and collect a tax for that purpose. The power to provide the necessary means for lighting the streets, buildings and offices, either by the construction of a gas manufactory or by contract, would seem to follow as of course."

Garrison v. City of Chicago, 7 Bissell, 480 (485).

If Judge Drummond was correct in holding that the power to provide for the lighting of the streets necessarily implied the power to do so either by the city itself or by contract, and also necessarily implied the power to construct a gas plant for that purpose, it must necessarily follow that the power to pave streets implies the power to do so either through the instrumentality of the city or by contract, and to construct a plant for the manufacture of any materials necessary for such paving. I have no doubt of the soundness of this decision, and find that it has been quoted with approval, as a conclusive authority in favor of the right of the city to erect, maintain and operate gas works, in an opinion of ex-Corporation Counsel John W. Green, rendered to the City Council under date of October 31, 1887 ("Opinions of the Corporation Counsel and Assistants", p. 106).

The right of a municipality to enter into such business enterprises has been recognized in the Supreme Courts of nearly all the States of this country and by the highest legal authorities. Judge Dillon says:

"A city may be expressly authorized in its discretion to erect a public wharf and charge toll for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense such powers are public in their nature, because conferred for public advantage; in another sense they may be considered private, because they are such as may be and often are conferred upon individuals and private corporations and result in a special advantage or benefit to the municipality as distinct from the public at large."

1st Dillon on Municipal Corporations, Sec. 27, cited with approval by Mr. Justice Bailey in *Wagner v. City of Rock Island*, 116 Ill. 139 (154).

I have no doubt, therefore, that the city has the power to purchase and erect a stone crushing plant or plants and operate the same for the purposes stated in your inquiry.

The general power to purchase and erect a stone crushing plant and to engage in the business of crushing stone exclusively for use on the streets and public buildings being established, the next question is, as to what, if any, legal restric-

tions exist affecting the manner of the exercise of this right. If it be admitted that the city is indebted to the extent of its present constitutional limitations (a question which is now the subject of judicial determination in the pending "judgment bond" case, *Stone v. City of Chicago*), the means must be provided for the purchase and operation of such plant without increasing the indebtedness of the city; that is to say, it must be done on a cash basis. The appropriations for the present year having been made, moneys received from general taxes are not now and will not be available for this purpose until the next appropriation ordinance. If, however, there is sufficient money available for that purpose from the miscellaneous receipts of the city derived from other sources than from the proceeds of general taxation, such money would be available for immediate use, the distinction being that, while both funds must be used only for "corporate" purposes, the former fund can only be disposed of by the annual appropriation ordinance, while the latter fund may be appropriated and used at any time, it not being subject to the statutory regulations for its appropriation which govern the appropriation of moneys received from the proceeds of general taxation.

Corporate purposes have been well defined as follows:

"Some purpose which is germane to the general scope of the object for which the corporation was created, or such as has a legitimate connection with that object and a manifest relation thereto. . . . A tax for a corporate purpose has been defined to be a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it." (Citing many cases.)

Wetherell v. Devine, 116 Ill. 631 (637).

The next question in logical order that arises is, whether or not the provisions of the statutes and city ordinances requiring certain improvements to be made by contract, awarded after competitive bidding, hamper the city in the exercise of the general power with which, as above shown, it is undoubtedly vested. Treating the question in the first instance, broadly, as though the purchase, erection and operation of stone crushers constituted the making of an improvement,

the question presents itself as to whether or not Section 74 of the local improvement act requires this work to be done by contract, and competitive bidding, it being assumed that the scope of the enterprise will involve the expenditure of more than five hundred dollars. Section 74 of said act reads as follows:

“All contracts for the making of any public improvement, to be paid wholly or in part by special assessment or special tax, and any work or other public improvements, when the expense thereof shall exceed five hundred dollars, shall be let to the lowest responsible bidder in the manner herein prescribed, such contracts to be approved by the President of the Board of Local Improvements.”

I am of the opinion that the words “any work or other public improvements” are governed by the words “all contracts for”, and that the act should be read as though the word “for” were repeated in the act after the word “tax” and before the words “any work or other public improvements.”

Moreover, the title of the act in question is, “An Act Concerning Local Improvements.” If the section refers to the making of contracts for improvements not to be constructed in whole or in part by special assessment, I am of the opinion that such part of the section is unconstitutional, on the ground that the title does not embrace such subject.

The City Council has, by ordinance (Section 1611, General Ordinances, Vol. 1), re-enacted, in substance, the statutory provisions above quoted, with certain additions. Said section reads as follows:

“1614. Contracts—How Made.] All contracts for the making of any public improvement to be paid for in whole or in part by special assessment, and any work or other public improvement, when the expense thereof shall exceed the sum of five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same, and shall be approved by the Mayor; but any such contract may be entered into by the said commissioner without advertising for bids, and without such approval, by a vote of two-thirds of all the aldermen elected.”

I am of the opinion that this ordinance, while not open to the constitutional infirmity of the statute, must be construed like the statute, as though the word "for" in the first line of the ordinance, limited and governed the words "any work or other public improvement" and were repeated in the ordinance after the word "and" and before the words just quoted.

Questions similar to the ones just discussed are now pending in the Supreme Court. But even if the decision of that court should be adverse to the conclusion which I have reached on this point, that decision cannot, in my opinion, affect the question now under discussion, for reasons which I will now proceed to state.

I have heretofore assumed, for the sake of argument only, that the statute above quoted and this ordinance apply to the municipal enterprises under consideration. I have not, however, attempted to lend my approval to this assumption, for it seems to me to be clearly unwarranted, untenable and illogical. Local improvements and public improvements have been often defined by the courts and by text writers. (*City of Chicago v. Blair*, 149 Ill. 310 (314); *Hewes v. Gloss*, 170 Ill. 436 (440); *Village of Hyde Park v. Wiswall*, 155 Ill. 262.) But without reviewing or quoting these utterances, it will be seen, upon examination of them, that each one of the things under consideration, and declared to be either a local or a public improvement, was some sort of a completed structure, permanent in its character, finished and adequate in itself for public use; and those things which have been declared not to be "improvements" have been denied that character, for the reason that they did not constitute a permanent, completed structure. If it should be necessary for the city to construct a large permanent building for the purpose of installing a complicated stone crushing plant, *the building itself* might be considered as a public improvement, and it would be necessary to construct such building under contract awarded by competitive bidding. But I am considering merely the purchase of stone crushers and steam engines, and setting them up on the banks of the Drainage Canal or some other appropriate location, under temporary

shelter, or as often done, on cars so that they may be moved from time to time as the supply of stone may be exhausted in their immediate vicinity; and it seems to me to be clear that such purchase and erection of engines and stone crushers, with temporary shelter, does not constitute a public or local improvement. The manufacture of crushed stone with this machinery does not constitute an improvement, either public or local. It is the manufacture of crude material, which may be used in the construction of either a public or a local improvement; but no person with any respect whatever for the accurate use of the words could contend that this raw material was in itself an improvement.

I therefore conclude that neither the statute nor the ordinance above quoted, has any application whatever to the purchase of machinery for crushing stone or to the business of crushing stone, and that no legal objections exist to the immediate establishment and operation of a stone crushing plant for the purpose specified in your letter.¹

The product could under the authority of the cases cited in the *Wagner case (supra)* be sold to street contractors for use in street paving. If the city can put itself in a position to sell crushed stone to paving contractors at prices materially below those now maintained by the material dealers who have a practical monopoly of this market, it is quite certain that much lower bids can be secured for street improvements.

Very truly yours,

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 30, 1903.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.
Gentlemen:

I have received your communication of October 22d, together with a special assessment receipt Warrant No. 30,942

¹Note: See opinion on page 576, citing case of *Schneider v. City of Menasha*, Supreme Court of Wisconsin, and published in 95 N. W. Rep., p. 94.

and a check signed by Charles Eger in favor of Grady & Wahlstrom.

From your letter and these documents I learn that Grady & Wahlstrom had a contract for constructing a sidewalk on both sides of West 57th street; that according to the custom of the board a permit was issued to the owner, permitting him to let the contract for said improvement in front of his lot, and if the same was laid in accordance with the ordinance that you would vacate the assessment; that the said Charles Eger thereupon let the contract for constructing the sidewalk in front of his lot to said Grady & Wahlstrom, who had the city contract for constructing the entire improvement; that upon the completion of the work the said Eger paid to the said contractors, Grady & Wahlstrom, the sum of \$105, the contract price for constructing said sidewalk; that when said contractors made their statement of the work done to the board, for the purpose of receiving a voucher for work done, they did not exclude the work done for said Eger or notify the board that they had been paid for this contract by said Eger; that accordingly a voucher was issued to said Grady & Wahlstrom, which included the cost of constructing the improvement in front of said Eger's property; that the board issued an abatement on the assessment on the property of said Eger less the proper charge for intersections, but that prior to the issuing of this abatement voucher the property owner had paid the county treasurer this assessment.

You request in your communication an opinion as to whether the City Council can legally and should pass an order directing that this assessment be returned to the property owner to the amount set forth in the abatement voucher.

You further state that the voucher issued to Grady & Wahlstrom in payment of work supposed to have been done will be short, and you further request an opinion as to whether or not an assignee of this contract voucher would have any claim against the city, should this assessment be returned, or whether the assignee stands in the same shoes as the original holder of the voucher.

In answer to your queries, I beg leave to state, it is my opinion that the City Council can legally and should pass

an order directing that this assessment be returned to the property owner to the extent of the amount set forth in the abatement voucher.

As to whether or not an assignee of this voucher would have any claim against the city for the amount returned, it is my opinion that he would not have. It has been held by the Supreme Court that special assessment bonds and vouchers are not susceptible of transfer by sale or assignment, so as to shut off the defense on the part of the municipality; in other words, that there can be no innocent holders of these bonds and vouchers, but that they are taken subject to all existing defenses. (*National Bank of La Crosse v. Patterson*, 200 Ill. 215 (218).)

Yours respectfully,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 30, 1903.

MR. EDWARD B. ELLICOTT, City Electrician.

Dear Sir:

I have your letter of the 26th inst. transmitting the following application of the Chief Engineer of the Chicago Union Traction Company.

“October 24, 1903.

“Mr. E. B. Ellicott, City Electrician, Chicago.

“Dear Sir:

“Kindly grant the Chicago Union Traction Company permission to renew trolley on curves at 5th avenue and Van Buren street; 5th avenue from Lake street to Van Buren street. Also Van Buren street from Green street to State street.

Yours respectfully,

“J. Z. Murphy,

“Chief Engineer.”

You ask the opinion of this department thereon, and request that this department prepare a form of permit.

July 27, 1896, the City Council passed an ordinance which was accepted by the grantees August 1, 1896, "authorizing the North Chicago Street Railroad Company and the West Chicago Street Railroad Company to substitute electricity as the motive power on all lines operated in the south division." (Page 1525, *et seq.*, Vol. 11, R. C. 1897.) Section 1 of said ordinance is as follows:

[Here follows Section 1 of the ordinance.]

By said ordinance the companies therein named were granted authority "to use electricity as a motive power for the operation of its cars in and along each and all of the streets and avenues *in and along which the said company . . . is now operating a street railroad by horse power; and to the same extent.*" So that, therefore, if said West Chicago and said North Chicago Street Railroad Companies were at that time (July 27, 1896) operating cars in 5th avenue from Lake to Van Buren streets and in Van Buren street from Green to State streets by horse power, said companies had the authority under said ordinance to change their motive power from horse to electricity.

If you find the fact to be that said companies were at the time of the passage of said ordinance operating in said streets by animal power, then under authority of the ordinance of the City Council of July 20, 1903, printed at pages 941, 942 and 943 of the current council proceedings, said permits may be issued.

Said ordinance provided, among other things, at page 943:

" . . . that any new permits issued by the Commissioner of Public Works from and after this date and until the argument and disposition of said motions, or until the further order of the City Council, shall contain provisions to the effect that the same are issued without any acquiescence by the City of Chicago in the aforesaid claims of the said receivers, or of any or either of them, and without any prejudice whatever to the claims or rights, in other respects, either of the City of Chicago or of any or either of said companies or of said receivers; and that such new permits and each and

every of them hereby authorized shall be in every respect without any such acquiescence on the part of the city and without prejudice to either or any of said parties."

Said order contemplates the issuance of permits by the Commissioner of Public Works, and I therefore deem it advisable to suggest to you that if the permit is issued it be done by the Commissioner of Public Works upon your recommendation.

Said ordinance allows the company to make necessary and ordinary repairs in order to maintain the status and therefore it is unnecessary to consider the question of applicant's fundamental rights to operate in said streets, the permits being without prejudice to the rights of the city or the company.

The permit should be issued in the following form:

"..... 190...

"City of Chicago,

"Department of Public Works,

"Bureau of Streets.

"Permission is hereby granted to R. R. Govin, J. H. Eckels and M. E. Sampsell, Receivers of Chicago Union Traction Company to

.....
.....
.....

"This permit, issued in pursuance of a resolution of the City Council adopted July 20, 1903, is without acquiescence by the city in any of the claims of said receivers set forth in their bills of complaint filed July 18, 1903, in the United States Circuit Court for the Northern District of Illinois against the City, et al., and without prejudice to any claims or rights whatsoever of the city, of said receivers, or of any other party to said suits.

"This department reserves the right to revoke this at any time.

"No.

".....,

"Commissioner of Public Works."

This form is not to be used as a precedent in any other

case. Permits will have to be drawn in each instance after an examination of the ordinances, applicable to the street under consideration.

I return herewith the said application of the company.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 30, 1903.

MR. CHARLES K. HERTS, Detective Bureau.

Dear Sir:

This department has been requested to give an opinion as to whether or not a machine in which purchasers deposit a nickel, receiving in return checks or tokens entitling them to merchandise of the value of not less than five cents, and in some cases more, is a gambling device within the meaning of Section 709 of the Municipal Code of Chicago of 1897, which reads as follows:

“No person shall bring into the City of Chicago, or have in his, her or their possession in the said city, for the purpose of gaming, any table, thing or device of any kind or nature, whereon or with which money or any other thing of value may in any manner be played for, under a penalty of not less than twenty-five dollars nor more than two hundred dollars for each and every offense.”

It has been held that “a *thing of value*” need not necessarily be a thing having intrinsic value. It is sufficient if it represents or can be exchanged for something of value.

Gibbons v. People, 33 Ill. 443.

It appears that the machine in question differs from the slot machine as ordinarily understood in this; that the person depositing nickels therein always gets at least as much as he has deposited, and therefore that he takes no chance of losing anything, but he has a chance of getting more than he pays for. It has been held in a number of different States

that such a device falls within the general description of gaming devices.

In the case of *Hudelson v. State*, 94 Ind. 426, it was held that where a merchant gave to every person buying fifty cents' worth of goods a ticket entitling the purchaser to one guess on the number of beans contained in a glass jar, and promised a prize to the person guessing nearest the correct number, that he was guilty of maintaining a lottery.

In *Loiseau v. State*, 114 Ala. 34, the defendant kept a slot machine into which customers deposited nickles, and the owner gave a five cent cigar for each nickle deposited. The machine showed a number of cards constituting a "hand", and the person drawing the highest "hand" received all the cigars; held, this was a gambling device.

It has also been held in several cases that where a merchant gives tickets to purchasers of goods at their market value entitling them to a chance to win other articles, the result to be determined by chance, that such a transaction constitutes gaming, for which he is liable to indictment and punishment.

Bell v. State, 37 Tenn. 507;

Eubanks v. State, 50 Tenn. 488;

New Orleans v. Collins, 52 La. Annual, 973.

The exact question here involved has been passed upon by the Supreme Court of Georgia, in the case of *Meyer v. State*. In that case the defendant, a cigar dealer, operated a "nickle slot trade machine." The machine was operated by placing a nickle in the slot, which caused a wheel within the machine to revolve and exhibit a number of cards constituting a "hand." The person depositing the nickle was entitled to a cigar, or package of chewing gum, each valued at five cents, and in addition thereto a prize according to the "hand" displayed. It was held that the operation of such a machine was a violation of the penal code, Section 407, declaring that "no person shall keep, maintain, employ or carry on any lottery in this State, or other scheme or device for the hazarding of any money or other valuable thing."

Meyer v. State, 112 Ga. 20.

To the same effect is the *Shumates case*, 15 Grattan, 653. In the last mentioned case the court says:

“It is true that a bet does imply risk, but it does not necessarily imply risk to both parties. There must be between them a chance of gain and a chance of loss, but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but cannot lose and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss.”

It has been held in a number of cases that the fact that each person gets the value of his money does not prevent the transaction from being a lottery.

U. S. v. Olney, 1 Abbot U. S. 275;

Taylor v. Smetten, 11 Q. B. D. 207;

Reg. v. Harris, 10 Ox. Cr. Cas. 352;

Am. Art. Union v. State, 7 N. Y. 288.

In principle the case presented in your inquiry is not distinguishable from those hereinbefore cited.

I am therefore of the opinion that the machine first above mentioned is a gaming device within the meaning of Section 709.

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

NOVEMBER 3, 1903.

MR. WILLIAM MAVOR, Chairman Finance Committee of the City Council.

Dear Sir:

I have your communication of recent date referring to the claim of Frank Sturges for damages arising from the destruction of windows in his building by a mob on July 16th, 1903. I have obtained reports from the police department

relative to the conditions existing on the above date, and also concerning the amount of damage done this building.

Section 256a, page 636, Hurd's Revised Statutes, 1901, provides:

"That whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city, then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof."

Section 256c provides:

"No person or incorporation shall be entitled to recover in any such action if it shall appear on the trial thereof that such destruction or injury of property was occasioned, or in any way aided, sanctioned or permitted by the carelessness, neglect or wrongful act of such person or corporation; nor shall any person or corporation be entitled to recover any damages for any destruction or injury of property as aforesaid, unless such party shall have used all reasonable diligence to prevent such damage."

Section 256f provides that certain notice of claim shall be presented to the city within thirty days after the damage occurs, and the provisions of this section seem to have been complied with by the claimant.

This statute has been construed by the Supreme Court of this State in the case of *City of Chicago v. Manhattan Cement Company*, 178 Ill., 375, and the constitutionality of the statute has been upheld.

The determining question in the present case is whether the claimant or the occupants of his building were free from such carelessness or neglect as would defeat the action. It seems probable from the reports hereto attached that had a request been made on the proper officials to furnish protection at the time the damage was done, such protection would have been furnished and would have prevented the damage.

Should you conclude from the reports submitted herewith, or from such other information as you may acquire, that

the owner or his tenant, the Kellogg Switchboard Company, failed to use all reasonable diligence to prevent the destruction of property, the case would be a proper one for submission to a jury for determination. The city, in cases of a cognate nature, has been heretofore successful either in totally defeating claims or in securing a large reduction in the amount of damages. This may be so from the apparent disinclination of juries to mulct a municipality in damages when it has put forth most strenuous efforts through its police department to protect the property of private individuals during times of riot and disturbance.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

NOVEMBER 3, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

On the seventeenth day of December, 1902, your honorable body passed an order calling upon the Corporation Counsel for an opinion:

First. As to whether the gas companies can refuse to supply gas to any corporation, firm or individual because of its or their or his failure to pay a gas bill which has been barred by the statute of limitations.

Second. Whether in any case a gas company has the right to refuse to supply gas to an individual, firm or corporation because of his, their or its failure to pay for gas already furnished, provided a sufficient deposit of cash is offered said gas company to pay for gas that may be consumed in the month succeeding such offer.

First. Replying to the first question propounded, I would say that I am of opinion that a gas company has no right to refuse to supply gas or to discontinue the supply of gas upon the ground that the applicant or the consumer was indebted

to the company for gas furnished if such debt is barred by the statute of limitations.

This conclusion is based upon the proposition that the right to assert the bar of the statute is a property right, of which the holder cannot be deprived without process of law. *Board v. Blodgett*, 155 Ill., 441; *Fish v. Farwell*, 160 id., 236; *Gibbs v. Chicago Title & Trust Co.*, 79 Ill. App. 22. The Wisconsin Supreme Court, construing the Illinois statute of limitations and citing the *Blodgett* and *Fish* cases, has held that the bar of the statute in effect, extinguishes a claim upon which it operates and does not merely affect the remedy for the enforcement of such claim. *Eingartner v. Illinois Steel Co.*, 79 N. W. 433; *Contra. Wallace v. Goodlett*, 104 Tenn., 670, 677; *Palmer v. White*, 46 Atl. 706; *Yarnal et al. v. Hupp*, 90 N. W. 645; *District of Columbia v. Railroad Co.*, 8 App. D. of C., 322, 377; *Campbell v. Holt*, 115 U. S., 620; *Suppiger v. Gruaz*, 137 Ill., 216.

It may also be said, speaking generally, that the courts do not favor attempts to indirectly enforce the collection of debts which are not legally subsisting liabilities by reason of the running of the statute of limitations. *Story v. Doris*, 110 Ga., 65, and *Railroad Co. v. Railroad Co.*, 203 Pa. St., 102

Second. Since your second query is not limited to any particular state of facts, it can be best answered by referring to the adjudications on the subject, which are conflicting, but all, or most of which concede that a gas company has the right to prescribe and enforce reasonable rules and regulations to govern the performance of the duty it owes the public to supply all who may apply for gas upon equal terms. *Charleston N. G. Co. v. Low*, 44 S. E. 410; *Owensboro Gaslight Co. v. Hildebrand*, 42 S. W., 351; *William v. Mut. Gas Co.*, 52 Mich., 499.

The doctrine of *Commonwealth ex rel v. City of Philadelphia*, 132 Pa. St., 288, that a gas company may require, before supplying an individual with gas, payment of all past due bills for gas furnished, at the premises covered in the application, either to the applicant or to *other* and *former* tenants, must be rejected as clearly unsound. *Turner v. Revere Water Co.* (Mass., '98) 50 N. E., 634.

The following cases represent the varying views entertained by the courts upon this question. *Mackin v. Portland Gas Co.* (Or.) 61 Pac. 134, 62 Pac. 20, holds that where a gas company has supplied gas to a consumer for a month *after* receiving from him a *deposit* in advance, and has been paid for the month's supply of gas, it may shut off his supply of gas *after* supplying him for another two weeks, upon the *sole ground* that he declines to pay a delinquent bill for gas furnished him over *two years* before at *other premises*, one of the rules of the company providing that "in default of the regular payment of a bill" it might discontinue the supply of gas until the bill was paid and the consumer having learned of this rule when he applied for gas. See also *People v. Manhattan G. L. Co.*, 45 Barb., 136.

Jones v. Mayor, etc. (Tenn., 1903), 72 S. E., 985, decides that an ordinance prohibiting the city officials from furnishing water to consumers until all indebtedness of such consumers for water previously supplied at any place whatever shall have been discharged is reasonable and valid, the ordinance, however, to be construed as applying not to past-due indebtedness, but to "dues for water recently and then being furnished", that is, to "current charges." In the above case the city had refused for three years to supply water to several places leased by the plaintiff, although payment was tendered in advance, it having cut off the supply of water because of plaintiff's failure to pay for water already consumed. See also *Montreal Gas Co. v. Cadieux*, 81 L. T. (N. S.), 274; *Bennett v. Eastchester G. Co.*, 57 N. Y. S., 847; *Detroit Gas Co. v. Moreton T. & S. Co.*, 111 Mich., 401; *Turner v. Revere Water Co.*, 50 N. E. 634 (referring to statute); *Krumenaker v. Dougherty*, 74 App. Div. 452 (under statute).

Crumley v. Watanga Water Co., 41 S. W., 1050, announces a doctrine contrary to the *Mackin* and *Manhattan* cases, holding that a water company cannot require as a condition of furnishing water that an individual shall pay a past-due indebtedness for water furnished over a year before when he tenders in advance as required by the company's rules, a quarter's rent, because the company having given him credit

in the past cannot thereafter enforce payment by denying him a present legal right.

And *Wood v. Auburn*, 87 Me., 287, decides that a water company cannot shut off a consumer's water supply for non-payment of an old, overdue and *disputed* installment of water rates *after* having accepted payment for a subsequent installment, such acceptance constituting a waiver of the disputed claim so far as the right of shut-off is concerned. *Contra. People v. Manhattan G. L. Co.*, 45 Barb., 136). The special circumstances in *Wood v. Auburn* made a very strong case, and it should not be too strongly relied on.

In the *Wood case* and other cases the right of gas or water companies to shut off the supply of the commodity they deal in is challenged when the unpaid bill in question is disputed, upon the grounds: 1. That they owe a duty to the public; 2. That the companies and the consumers of the necessities dealt in by the former do not stand upon equal ground; 3. That where a bill is disputed permission to exercise the right to refuse to furnish gas or water, or to discontinue the furnishing of the same allows the companies to judge their own case. *American Water Works Co. v. State*, 46 Neb., 194; *State ex rel v. Kinlock Tel. Co.*, 93 Mo. App., 349.

The various cases here referred to contain a full discussion of the rights and duties of public service corporations and refer to many decisions not cited in this opinion.

I think the following general principles may be deduced from the authorities as fairly representing the best view of the law.

1. A rule of a gas company permitting it to discontinue the supply of gas to a consumer at any premises whatever if he fails to pay any of his current or monthly bills for gas is a valid regulation and may be enforced if known to the consumer when he applies for gas.

2. A rule, or a practice, or unwritten rule that where a consumer has been deprived of gas under the rule just mentioned, he will not again be furnished gas at any premises until the unpaid bill is discharged, is also valid and enforceable until the running of the statute of limitations.

3. No individual can be compelled, under cover of any

rule, as a condition of obtaining gas, to pay the old debts of another consumer.

4. A company cannot, probably, require a consumer to satisfy his old and past-due liabilities for gas *after* the company has again supplied him for some time with gas, under penalty of having his gas supply discontinued.

5. A rule of a gas company requiring a cash deposit in advance of furnishing gas is generally upheld as a reasonable regulation, but the validity of such a regulation does not affect in any way the question of the reasonableness of a "shut-off" rule.

To illustrate the application of these principles and decisions to a particular gas company, The Peoples Gas Light and Coke Company may be taken as an example.

The charter of that company provides (Private Laws of Illinois, 1865, Vol. 1, p. 589) that the company "may adopt such by-laws, rules and regulations . . . as they may think proper, not inconsistent with the laws of this State," and since Chapter 74, Section 13, p. 1044 of Hurd's Statutes (1899) seems to recognize that a rule demanding an advance deposit by gas companies is a reasonable regulation, it can hardly be doubted that this particular company could, if it saw fit, adopt a rule requiring such a deposit despite Sections 745-749 of the Municipal Code of 1897, because Section 745, so far as it prohibits this company from accepting deposits in advance from consumers, is probably void.

I have been furnished with a form of the application for gas which the Peoples Gas Light and Coke Company requires its consumers to sign, and which I am informed has been in force since 1900. It contains the following provision: "The company's agents are . . . to stop the supply of gas for non-payment of bills, when due, for any gas furnished to the subscriber at said premises or elsewhere in the City of Chicago."

Under this provision it would seem that the company can only shut off the gas supply of a consumer for a failure to pay gas bills that become due in the future, and that the parties to the contract do not contemplate a shutting off of the supply of gas for failure to settle any liabilities that were

existing prior to the date of the signing of the application by the consumer. A like contract has been so construed. *Lloyd v. Gaslight Co.*, 1 Mackey, 331.

Therefore it is evident that it is necessary to examine the rule or rules of the company in question with reference to the facts of the particular case that may be in question.

Respectfully submitted,

MACLAY HOYNE,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.
Corporation Counsel.

NOVEMBER 5, 1903.

MR. WILLIAM MAVOR, Chairman Committee on Finance.

Dear Sir:

As requested by your committee in the communication of the 4th inst. from Mr. White, I wrote President Wheeler, of the Chicago Telephone Company, requesting him to submit such correspondence as he desired to have considered by your committee, and to-day I am in receipt of a letter from him bearing date the 4th inst., calling attention to a letter addressed to Norman Williams, Esq., Vice President Chicago Telephone Company, signed by W. H. Purdy, Commissioner of Public Works, and dated October 12th, 1889, which he quotes as follows:

“Dear Sir—

“Our Corporation Counsel, Mr. Hutchinson, has given us a written opinion which speaks for itself. I herewith quote it: ‘Referring to your question as to whether the permit given the Chicago Telephone Company to lay conduits, etc., in the City of Chicago would extend to the recently annexed territory, I would say that in my opinion the rights granted to the Chicago Telephone Company to use the streets in the City of Chicago previous to the annexation could not be extended by the act of annexation. The territory is limited by the boundaries as they existed at the time of the passage of the ordinance, and they cannot be extended except by act of Council.

“ ‘Acting under the above, we cannot give permits for new territory.’ ”

Mr. Wheeler in his letter states also that similar decisions were expressed verbally and otherwise in the succeeding years, the company and the city always proceeding upon the idea that the ordinance of 1889 referred to the city limits at the time of its passage in its effect.

I am not able to agree with the views expressed in the letter above quoted, as the entire trend of all the recent decisions supports the views set forth in the opinion furnished Deputy Comptroller Gosselin September 30th, 1903. The United States Supreme Court and the courts of last resort of New York, Minnesota, Missouri, Iowa and Illinois, as well as others, have construed city ordinances as looking to the future growth of the city limits in their effect, and while at the time the learned Corporation Counsel, Judge Hutchinson, prepared his opinion the law may have been as he stated it in the letter quoted, I think it is not the law to-day. But the opinion rendered by Corporation Counsel Hutchinson is not necessarily inconsistent with the opinion of September 30th, 1903, because even if the telephone company has been and is erecting its poles and wires in the annexed territory under the provisions of the various town grants, it became liable, upon the annexation of said towns, to pay to the city compensation for the business done in such territory, this liability resting upon its contract embodied in the ordinance of January, 1889.

I do not find any other written opinions along the line of Corporation Counsel Hutchinson's opinion except one, by Assistant Corporation Counsel Robinson, dated January 9th, 1890, which appears on page 145 of the compilation of “Opinions of Corporation Counsel and Assistants”, from 1872 to 1897. But the question involved in this latter opinion is not the same as that involved in the present controversy, because, in the former case, the question was apparently as to the application of general ordinances of the City of Chicago, to which the corporation concerned has not assented, to annexed

territory in which such corporation had by contract obtained vested rights.

Very truly yours,

EDGAR B. TOLMAN,
Corporation Counsel.

NOVEMBER 6, 1903.

MR. LINN H. YOUNG, Chairman Committee Streets and Alleys
South, of the City Council.

Dear Sir:

December 17th, 1902, this department was requested by the City Clerk to render an opinion on an enclosed communication concerning the removal of passageway of Marshall Field & Co. over Holden place.

The letter of the Clerk was misplaced in the files and has just been found.

The communication referred to is a notice dated November 29th, 1902, to the City Clerk from one Robert L. Reid, and is as follows:

“CHICAGO, NOVEMBER 29, 1902.

“TO WILLIAM LOEFFLER, Clerk of the City of Chicago.

“I hereby call your attention to a certain obstruction in and over the public streets of the City of Chicago, County of Cook and State of Illinois. The same being a covered passageway over and across the alley running between lots nine, ten and eleven on one side, and lot six in the Assessor's Subdivision of lots six, seven, eight, etc., on the other, all in block thirteen, Fort. Dearborn Addition to Chicago, the said alley being known as Holden place, Chicago, County of Cook and State of Illinois. The said passageway is now being used by Marshall Field & Co., a corporation, as a passage way for the purpose of connecting the two buildings used and occupied by the said Marshall Field & Co. as a retail store. The said passageway is now being used for private purposes, in violation and contrary to the laws of the State of Illinois.

“I hereby notify you that I am a citizen of the City of Chicago, County of Cook and State of Illinois, and as such citizen I hereby demand that as such municipal corporation you perform and do the duties devolving upon you

under the laws of the State of Illinois and the ordinances of the City of Chicago; that you take such steps and perform such acts as by law you are commanded to do, and that may be necessary to remove or cause to be removed the said passage way and obstruction without delay.

(Signed)

“ROBERT L. REID.”

The bridge or passage way referred to in this notice was the subject of litigation between Marshall Field & Co. and certain property owners in the same block, and the entire controversy was passed upon by the Supreme Court of Illinois in the case of *Field et al. v. Barling et al.*, reported in Volume 149 of the Illinois Supreme Court Reports, at page 556 *et seq.* The Court held that the bridge or passage way was an obstruction and that the ordinance of the City Council authorizing its construction and maintenance was void.

Please find enclosed said notice and a copy of the opinion of the Supreme Court.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 7, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I acknowledge receipt of your letter of September 8th; referring to the switch tracks of Jonathan Pettet, together with his attached communications referring to the two ordinances passed by the Board of Trustees of the Town of Lake, granting switch track privileges to the Indiana Gravel & Sand Company, and also to himself, but of which privilege he is now deprived because of the elevation of the tracks of the Western Indiana Railroad Company, with which his switch tracks were connected.

Up to the time of the annexation of the Town of Lake to the City of Chicago, it was operating under a special charter adopted in 1869. On August 16th, 1886, the Board of Trus-

tees of said town granted, by ordinance, to Jonathan Pettet permission to lay a side track from the tracks of the Western Indiana Railway Company to Pettet's lumber yard, which ordinance was as follows:

On June 18th, 1889, on petition of the Indiana Gravel & Sand Company, the Board of Trustees of said town granted, by ordinance, permission to said company to lay a switch track connecting with the tracks of the Western Indiana Railroad Company, in the vicinity of Sixty-second and Wallace streets, which petition and ordinance are as follows:

You ask if there is any legal objection to granting Mr. Pettet a permit to elevate the said switch tracks so as to connect them with the said railroad, or whether or not it is necessary for him to procure an ordinance from the City Council to do so.

I am informed by Mr. Pettet that at the time of the passage of the last mentioned ordinance he was the owner of a portion of the land on which this track was laid, and that in 1890 he acquired the balance of the land from the Indiana Gravel & Sand Company, and has since then maintained the latter switch track.

You will observe that both of these ordinances attempt to confer a privilege designed to be perpetual in duration; and that the ordinance granted to the Indiana Gravel & Sand Company does not provide that it may be transferred or assigned.

I am of opinion that under said ordinances Mr. Pettet has not acquired any rights that the City of Chicago is bound to recognize.

The provisions of the town charter applicable to this inquiry are to be found in Sections 11 and 15 thereof. Clause 12 of Section 11 provides that the Board of Trustees shall have power "To control and regulate the streets, alleys and other public places, and abate any obstructions, encroachments or nuisances thereon." Section 15 provides that "The said Board of Trustees shall have power, from time to time: To cause any street, alley or highway to be opened, altered,

widened, extended, laid out, vacated, bridged, graded, macadamized, paved, planked, clayed, graveled, or to be otherwise improved, and to keep the same in repair."

In Cooley's Constitutional Limitations, 6th Ed., page 251, it is said:

"A corporation having power, under the charter, to establish and regulate streets, cannot under this authority, without explicit legislative consent, permit individuals to lay down a railway in one of its streets, and confer privileges exclusively in their care and designed to be perpetual in duration."

In Dillon on Municipal Corporations, Section 716, it is said:

"The judgment of the court in the case just mentioned (*Davis v. New York*) rests upon the sound principle that the powers of a corporation in respect to the control of its streets, are held in trust for the public benefit, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered or delegated by contract to private parties, either corporate or natural. In this case there was no such authority, and hence the resolution of the Council authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation and without limit as to time, was not a license or act of legislation, but a contract; void, however, because if valid it would deprive the corporation of the control and regulation of its streets."

In *Boise City Water Co. v. Boise City, Idaho*, 123 Fed. Rep., 232; 10 Mun. Corp. Cases, 887, it is said:

"Legislative grants of powers to municipal corporations are to be so strictly construed as to operate as a surrender of the sovereignty of the State no further than is expressly declared by the language thereof."

And in the same opinion the Court further say:

"A municipal corporation entrusted with the power of control over its public streets cannot, by contract or otherwise, irrevocably surrender any part of such power without the explicit consent of the Legislature."

In the case of *Cedar Rapids Water Co. v. City of Cedar Rapids*, decided by the Supreme Court of Iowa in October, 1902, and reported in 9 Mun. Corp. Cases, 107, the Court say:

“Grants of privileges in perpetuity or for unreasonably long periods of time, are generally regarded as against public policy, and if ever valid, the authority therefor must be found in the constitution or statutes of the State.”

In the same opinion the Court further say :

“The general rule that an *ultra vires* contract is void and unenforceable at law or in equity is, for obvious reasons, of more imperative application to acts of municipal corporations than to those of private corporations. The exception to the rule which permits the enforcement of an *ultra vires* contract which has been partly performed, is not recognized in cases where the power to make the contract does not exist under any circumstances, or is expressly forbidden by statute.

. . . A person dealing with a municipal corporation is held to know the extent of the power of such corporation, and if, with such knowledge, he obtains a grant for which there is no legal authority, or is in violation of an express statute, he does so at his peril, and obtains no right which is enforceable in the courts. . . . Neither can there be any such acquiescence or waiver by the city as will prevent or estop it from denying the validity of an act beyond the scope of its municipal powers. A different rule sometimes obtains when the power to contract exists, but has been defectively or irregularly executed; but, if the authority to do the act or make the contract is expressly withheld or denied by law, that fact may always be set up as a defense to an action brought thereon.”

In the case of *Seegar v. Mueller et al.*, 133 Ill., 87, the Court said :

“Such bodies (municipal corporations) act wholly under a delegated authority, and can exercise no powers which are not in express terms or by fair implication conferred upon them. . . . No estoppel can ordinarily arise from the act of a municipal corporation or officer done in violation of or without authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers, and therefore cannot be deemed to have been deceived or misled by acts done without legal authority.”

To the same effect is *Snyder v. City of Pulaski*, 176 Ill., 403.

Neither the charter of the Town of Lake nor any law of the State conferred upon said town, either in express words or by necessary implication, the power to make what amounts to a perpetual grant. It is well settled that all grants made by a municipal corporation are to be construed most strictly against the grantee.

I am of the opinion, therefore, that both the said ordinances were, at the time of their passage, *ultra vires* and void. It follows that Mr. Pettet is not entitled to a permit to elevate the tracks, and he must procure an ordinance from the City Council granting him the desired privilege.

In the view I have taken of the question, it is not necessary to decide as to the effect of the attempted transfer by the Indiana Gravel & Sand Company of its supposed rights under the said ordinance.

Yours truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

NOVEMBER 9, 1903.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to the communication of Commissioner of Health Reynolds, addressed to you, suggesting that to the "Toy Pistol" ordinance recently passed an additional section be added authorizing police officers to confiscate the prohibited articles mentioned in Section 1 of the ordinance, I beg leave to say that in my opinion such a provision would be invalid, in that it would have the effect of depriving a person of his property without due process of law. The violation of the ordinance must first be judicially established. In order to constitute such a violation it must be shown that the article seized is prohibited; that the person in possession of such article is a minor, and that the transaction occurred within the limits of the City of Chicago. These things must be deter-

mined by a judicial proceeding, and the police officer cannot act as judge and executioner.

Gear v. Bullerdick, 34 Ill., 98.

23d Cent. Digest, 1451.

Very respectfully yours,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 9, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

In pursuance to the order passed by your honorable body at its last regular meeting, directing the Corporation Counsel to render an opinion as to whether or not the carrying on of a blacksmithing business on Sunday in the shop located at 390 West Division street, is in violation of the law, and if the same may be suppressed, I beg leave to advise you that Section 261 of Chapter 38 of the Revised Statutes, entitled "Criminal Code", covers such a case and is in part as follows:

"Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted) or by any amusement or diversion on Sunday, shall be fined not exceeding \$25."

By the decisions of our Supreme Court construing the said statute, it is held that the act of labor on Sunday is not an offense, unless it be done in a way to disturb the peace and good order of society, which it is the primary purpose of the statute to prevent. The Court defines "works of necessity" to be not a physical and absolute necessity, but a moral fitness or propriety of the work done under the circumstances of each particular case. It has been held that the keeping open by persons of their places of business in a community on Sunday for the exercise of the business of their ordinary calling, is a public and serious interference with the observance of the day

in its accustomed mode. One's religious opinions will not shield him from the penalty for such disturbances.

If it can be proved beyond a reasonable doubt that the peace and good order of society is disturbed by the manner in which the blacksmithing business is carried on, on Sunday, at the premises in question, a conviction under the statute would be warranted, otherwise not.

Richmond v. Moore, 107 Ill., 429;

Foll v. People, 66 Ill. App., 405.

This department, therefore, cannot answer your question, it being a question of fact which can only be decided in court upon the trial of a prosecution for breach of the statute above quoted. This opinion is only intended as a statement of the principles of law which will control in the determination of said question of fact on such trial.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

NOVEMBER 10, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

You have referred to this department a lease from Mary A. King to the City of Chicago, dated May 1st, 1894, conveying certain premises therein described for the term of the natural life of the said Mary A. King, at an annual rental of \$2,500. Said lease is executed on behalf of the city by John P. Hopkins, Mayor, and William K. Ackerman, City Comptroller, and attested by Charles D. Gastfield, City Clerk.

You request an opinion from this department as to whether or not this lease is valid in view of the facts that, first, the same is for an indefinite term of years, and, second, that it does not appear to have been authorized by the City Council.

As to the first point, my opinion is that a lease otherwise valid would not be invalid merely from the fact that it is not for a definite period of years.

As to the second question, I would say I am informed by your department that the ground in question was desired and is being used by the city for the purposes of the municipal electric light bureau; also, that no appropriation was made for the rent before the lease was executed, and that the rent has never been specifically appropriated for, but has been paid out of moneys appropriated for "other expenses" of plant No. 6.

It is a well-known and general rule of law that municipal corporations will be held to a strict observance of their powers. They are, however, not limited to powers expressly granted, but possess in addition all such powers as are necessarily incident to those specified, or essential to the purposes and objects of their corporate existence.

It is also a rule of law that where the mode of exercising a power is prescribed by the Legislature, such mode is exclusive and must be strictly followed.

The rule that municipal corporations are held to a strict observance of their powers applies with equal force to the officers and agents of such corporations. If the Mayor of Chicago has power to bind the city by a lease of this character, we must look for such power among those expressly granted to him, or necessarily implied from those granted.

The sources of the Mayor's power are three in number: first, those provisions of the original charter of Chicago which have not been superseded by any provision of the General Incorporation Act, popularly known as the "Cities and Villages Act"; second, the "General Act for the Incorporation of Cities and Villages", adopted April 10, 1872; and third, the ordinances of the City of Chicago.

A careful examination fails to disclose any express authority to the Mayor to execute a lease of this character, and nothing from which such authority can be implied. If the Mayor has power to lease land for a municipal electric light plant, it would follow that he would have the same authority to let contracts for buildings and to buy machinery therefor. That he has not such power has been expressly decided in a case involving a similar question. (See *City of Chicago v. Fraser*, 60 Ill. App., 404.)

In that case the Mayor and Commissioner of Public

Works entered into a contract to purchase a quantity of machinery for a water works pumping station. The Court held that, without further authority from the City Council, they had no power to make such contract and that it was void.

The power of providing for the lighting of the streets has been expressly committed to the City Council by the General Incorporation Act, in Clause 11, of Section 1, Article 5. Under a similar power it has been held that the City Council would undoubtedly have power to purchase or build and operate an electric light plant. (See *Mauldin v. City Council*, 33 So. Car., 1.) The City Council, of course, can only act by ordinance. If the Council had authorized the execution of this lease by ordinance, a different question would be presented.

The lease in question is, in my opinion, obnoxious to another objection: Section 2254 of the Revised Code of Chicago reads as follows:

"No contract shall be hereafter made by the City Council . . . and no expenditure shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the City Council or Board of Trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

A contract entered into without authority may, however, in most cases, be ratified. If after the execution of this lease the City Council had been informed of its execution and had appropriated money expressly for the purpose of paying the rent reserved, then it might be said that the Council had ratified the lease, but it does not appear that any such thing was done.

For the reasons above stated, I am of the opinion that the lease in question is not valid.

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 10, 1903.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have the honor to submit herewith copy of a decision of the Supreme Court of Wisconsin in the case of *Schneider v. City of Menasha*, 95 N. W. Rep., p. 94, made public since my opinion of October 29th, holding that the city can carry on the business of crushing stone for use on its streets, and that, as an incident to this power, it may buy real estate outside of the corporate limits.

The opinion is of interest on account of its review of the leading cases in many jurisdictions on the power of the city in municipal enterprises. The logic of the case, carried to its proper conclusion, would authorize the city, if it takes over a street railway system, to operate lines necessarily and reasonably connected with the operation thereof, outside of the city limits. If it should take over a telephone system or gas plant, it might operate part of those systems beyond the city limits. In fact, it supports the doctrine that the city, in carrying on municipal enterprises of a business nature, as distinguished from those enterprises which involve purely the exercise of governmental functions, may do anything that an individual might do under the same circumstances, subject only to the limitations that said acts must be reasonably connected with the enterprise and a legitimate part thereof.

This answers your verbal inquiry as to the right of the city to establish an electric lighting plant, for the purpose of lighting streets and also selling electricity to private consumers. Under the authority of this case and the cases therein cited, I am clearly of the opinion that the city would have the power to establish an electric lighting plant for the purpose of lighting the streets, and if it generated more electric power than was necessary for said purpose of lighting the streets, that it might sell its surplus electricity to private consumers for lighting purposes or for power purposes.

Very respectfully yours,

EDGAR B. TOLMAN,

Corporation Counsel.

NOVEMBER 10, 1903.

TO THE HONORABLE; THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

I hereby acknowledge receipt of your favor of the 2d inst., requesting an opinion as to how the Board "can enforce the maintenance guarantee (in paving contracts) when, for any reason, the contractor and his security fail to pay any attention to notices served on them that their work needs repairs."

The pertinent part of the maintenance clause referred to is as follows:

"It is hereby understood and agreed that the material furnished and used and the workmanship employed in the construction of the said pavement shall be of such character and quality as to insure the same to be free from all defects, and in continuous good order and condition satisfactory to the Board of Local Improvements, ordinary wear excepted, for a period of . . . years from and after the completion and acceptance of the same; and as a guarantee of the faithful performance of these specifications, the quality of the materials furnished and the proper construction of said improvement, the contractor or contractors hereby agree to keep and maintain the said improvement, without additional charge or cost to the city of Chicago, in such good order and condition as will be satisfactory to the Board of Local Improvements, ordinary wear excepted, for the period of . . . years from and after the completion and acceptance of the same, which keeping and maintaining shall include repairs or the entire reconstruction of the same, the necessity for which may be occasioned by or through the use of faulty or inferior material or workmanship, or from any other cause whatsoever; . . .

"If the contractor or contractors shall fail, neglect or refuse to repair, keep and maintain the said pavement in good order and condition in accordance with these specifications, within five (5) days after notice so to do from the Board of Local Improvements, the said Board of Local Improvements may proceed to do, or cause to have done, the work necessary to comply with the same, and collect the cost and expenses thereof from the said contractor or contractors or his or their bondsmen."

This clause has been held to be valid by the Supreme Court of Illinois in *Cole v. People*, 161 Ill., 16.

Under the provisions of the clause the city has three remedies:

First. It is clear that so long as the Board holds moneys due a contractor on his work, it may deduct amounts sufficient to cover the costs of repairs, which the contractor may have failed to make after having been duly notified.

Second. By the term of the clause itself the Board may, on the failure of a contractor to repair after due notice, make the repairs and collect the cost and expenses thereof from the contractor.

The practical question here presented is how the Board will obtain the funds necessary to make the repairs. On that point it is suggested that the Board request the Finance Committee to appropriate a reasonable amount for repairs, which amount could be approximately estimated by the Board. This repair fund after the advance is once made by the City Council could be replenished by the recoveries obtained by the Board in the suits against the contractors for failure to keep their covenant to repair.

Third. The Board may institute suits on the bonds of contractors who have failed to make repairs after notice, without first making the repairs and then suing for the cost and expense thereof. In other words, as a matter of law, under the provision of the clause quoted, the Board has the right to *elect* whether it will make the repairs after the contractor's failure, and then recover the costs in a suit on the contractor's bond, or whether it will begin suit against the bond before making the repairs, and after due notice to the contractor.

In the latter case the measure of damages would be the cost of the repairs. The breach of the covenant to repair arises, when, after due notice, the contractor fails to make the repairs, and the right of action accrues the instant the breach of covenant occurs. The recovery of damages is another and different question from that of the right of action which depends solely on the breach of covenant.

It is well settled on authority that in an action for breach

of covenant to repair, the damages that may be recovered are estimated by determining the reasonable cost of the repairs.

Phelan v. Andrews, 52 Ill., 486.

St. Louis, etc., Ry. Co. v. Surton, 72 Ill., 118.

Strawn v. Cogswell, 28 Ill., 457, 461.

Kimball & Co. v. Doggett, 62 Ill. App., 528.

Vivian v. Campion, 2 Ld. Raym., 1125.

Beach v. Crain, 2 New York, 86.

Howe Machinery Co. v. Reber, 66 Ind., 498.

Cincinnati, etc., Ry. Co. v. Village, 36 Ohio St., 631.

And it has been expressly held in *Cincinnati, etc., Ry. Co. v. Village*, *supra*, that a city is not under duty first to perform the work before it can sue on a breach of contract. In that case the Court, on this point, said (pp. 637, 638) :

“The measure of damages in such cases is compensation, and, of course, corporate compensation must be limited to the corporate injury; but, where the injury resulting to a corporation by the breach of a contract is the same that would have resulted to a natural person from a like breach, the rule of compensation is the same. . . . Here we have a violated contract entered into by parties authorized to contract; and made, though by, a municipal corporation, in relation to its corporate affairs. We cannot, therefore, see why the ordinary rule of damages should be departed from, or why the municipal corporation should be required to perform the work contracted for before instituting an action for damages for the breach of the contract. Should a tax be collected to pay for the work, and an action then brought for the purpose of reimbursing the taxpayer? Surely not. Nor does it matter at all, to the delinquent contractor, whether or not the work which he contracted to do, but failed to perform, should ever be accomplished. Whether the damages realized in such action should be devoted to the improvement contracted for, or to other purposes, is a question between the village and its citizens, with which the railroad company can have no concern.”

Even if the city were to make the repairs *before* suing, the amount that the city actually paid for the repairs would not necessarily fix the damages, but the measure thereof would be the reasonable cost and expense of making such repairs. In

other words, the damages would be estimated on the basis of what was the true value of the repairs, and not what the city actually paid for them.

State v. Ingram, 27 N. C., 441.

It may be suggested that the city could not maintain an action on the breach before making the repairs, because until such repairs are made the city has not incurred any costs and expenses. The answer to this is that the rule is well established that if a legal liability is incurred to pay money by reason of a breach of contract, the amount of such liability may be recovered as an element of damage, although the money has not been actually paid; and that when defects in pavements occur, the city is under a legal duty to repair the same, and, therefore, on the rule stated, the city could recover in an action on a breach of covenant to repair the pavements, the amount of money necessary to make such repairs.

The guaranty herein is a continuing one, and an action may be maintained thereon, and damages recovered as often as a breach occurs during the period agreed upon.

Dent v. Davidson, 52 Ill., 109.

Very truly yours,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

FRANK JOHNSTON JR.,

Assistant Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 10, 1903.

MR. THOMAS M. HUNTER, Alderman Thirty-fifth Ward.

Dear Sir:

In accordance with your request of November 3d, 1903, I transmit to you herewith draft of a proposed ordinance licensing restaurants.

The amounts fixed for license fee and penalties may of course be changed if thought desirable; they were merely inserted by way of suggestion.

Although the question of whether or not the City Council

has power to license restaurants has never been passed upon by the Appellate or Supreme Courts, and although there is no express power granted to the Council for such action, still, after a careful examination of the whole question, I am of the opinion that the Council has such power under Clause 66 of Section 2225 of the Revised Code, relating to the police power, and Clause 78 relating to health regulations, and also Clauses 50 and 53.

A discussion of the question here with citation of authorities would unduly extend this opinion, but I have filed herewith a brief, to which reference may be made.

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 11, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

I have your letter of November 2d, 1903, requesting the opinion of this department on the question of whether or not you should approve the payment of vouchers for Mr. Sloan, Superintendent of the House of Correction, one for \$61.75 to Miss Alma M. Brach, and the other for \$50 for housekeeping expense, without the approval of the Civil Service Commission. The question raised by your inquiry arises under the following sections of the Civil Service Act:

"Sec. 29. No accounting or auditing officer shall allow the claim of any public officer for services of any deputy or other person employed in the public service in violation of the provisions of this Act."

"Sec. 31. No Comptroller or other auditing officer of a city which has adopted this Act shall approve the payment of, or be in any manner concerned in paying, any salary or wages to any person for services as an officer or employe of such city, unless such person is occupying an office or place of employ-

ment according to the provisions of law and is entitled to payment therefor.

“Sec. 32. No paymaster, treasurer, or other officer or agent of a city which has adopted this Act shall wilfully pay, or be in any manner concerned in paying, any person any salary or wages for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor.”

As to the voucher for the amount paid to Miss Alma M. Brach, the propriety of approving its payment depends on the question of whether or not Miss Brach is an officer or employe of the city within the meaning of the sections quoted. An employe is one who is in the regular and exclusive employment of the city; while on the other hand, if the person has an independent vocation outside of the city employment, and is merely performing special and transitory services for the city as incidental to his or her regular work, even though such employment may occupy the greater part of such person's time, then such person is not to be regarded as an employe of the city, and consequently not under the Civil Service Law.

In the case of Miss Brach, this department is informed and understands that she is not regularly employed by the House of Correction; that she has an independent vocation outside of her work for the city; and that the work she does for the city is of a special and occasional character, such as taking stenographic reports of proceedings in the Juvenile Court, compiling statements for said court, writing occasional letters for the Superintendent of the House of Correction, for all of which she is paid according to the value of each particular piece of work done by her. It appears that the great bulk of the Superintendent's correspondence is written in longhand by prisoners at the House of Correction, and it is only occasionally that he requires a letter written on the typewriting machine, and in such cases Miss Brach is employed to do the work.

Assuming these facts to be true, I am of the opinion that Miss Brach is not to be considered an employe of the city

within the meaning of the Civil Service Law, and that consequently you may properly approve the payment of said voucher, if otherwise correct and proper, without approval of the Civil Service Commission.

As to the item of \$50 for housekeeping expense, it appears from an inspection of the voucher that there is nothing to indicate that this item is for payment to any person as compensation for services rendered, except that there is noted opposite said item the letter "A", indicating that the item is to be classified as having been expended for salary. It seems to me that this classification is incorrect and that the use of said letter "A" is without any significance in the solution of the questions here involved. I am informed that this amount is the sum paid for wages of a housekeeper for the Superintendent's residence.

The Superintendent of the House of Correction is required by law to "reside at the House of Correction and devote all his time and attention to the business thereof."

Chapter 67, Starr & Curtis' An. Stat., Sec. 7.

I am informed that the Board of Inspectors of the House of Correction makes an allowance to the Superintendent for housekeeping expenses, and the Superintendent maintains that the wages of his housekeeper is a proper item of household expense.

I am inclined to agree with this position. I think that in no proper sense it can be said that the said housekeeper is an employe of the city, or renders services to said city, but on the contrary whatever services she renders are strictly personal to the Superintendent, and the compensation, therefore, constitutes a part of his household expenses.

For the reasons stated, my conclusion is that you may properly approve for payment, without the approval of the Civil Service Commission, the item in question. All vouchers and correspondence returned herewith.

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 14, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have received your letter transmitting applications of the receivers of the Chicago Union Traction Company for permits to install electric equipment for the operation of overhead trolley lines on cable lines on certain streets, in which letter you ask my opinion, whether or not you are under legal obligation to issue such permits. Said applications are as follows:

First. An application for a permit to install electric equipment for the operation of an overhead trolley on Lincoln avenue, between Wrightwood and Fullerton avenues, for the connection of the electric line on—

(a) Lincoln avenue, between Wrightwood and Belmont avenues, and the electric line on

(b) Sheffield avenue, between Lincoln avenue and North Clark street, with the electric line on

(c) Lincoln avenue, between Fullerton and Webster avenues, and the electric line on

(d) North Halsted street, from Fullerton avenue to the north branch of the Chicago River.

Second. An application for a permit to install electric equipment for the operation of an overhead trolley on Lincoln avenue, between Webster and Garfield avenues, for the connection of the electric line on

(a) Lincoln avenue, between Fullerton and Webster avenues, and the electric line on

(b) Webster avenue, between Racine and Lincoln avenues, with the electric line on

(c) Lincoln avenue, between Garfield avenue and Center street.

Third. An application for a permit to install electric equipment for the operation of an overhead trolley on Division street, between Orleans (formerly Market) and Wells street, for the connection of the electric line on

(a) Division street, from the north branch of the Chicago River to Orleans street, and the electric line on

(b) Sedgwick street, between Center and Division streets, with the electric line on

(c) Division street, between Wells and North State streets.

Fourth. An application for a permit to install electric equipment for the operation of an overhead trolley on Wells street, between North avenue and Michigan street, for the connection of the electric line on

(a) North avenue, from Milwaukee avenue to North Clark street, and the electric line on -

(b) Illinois street, between Orleans and Wells streets, with the electric line on

(c) Wells street, from Michigan street to the center of the Chicago River, and the electric line on

(d) Fifth avenue, from the center line of the Chicago River south to Randolph street.

Fifth. An application for a permit to install electric equipment for the operation of an overhead trolley on Clybourn avenue, between Division and Halsted streets, for the connection of the electric line on

(a) Clybourn avenue, between North avenue and Fullerton avenue, and the electric line on

(b) North Halsted street, from North avenue to Evanston avenue, and the electric line on

(c) North avenue, from Milwaukee avenue to Clybourn avenue, and the electric line on

(d) Larrabee street, from Lincoln avenue to Clybourn avenue, with the electric line on

(e) Division street, between Clybourn avenue and Sedgwick street, and the electric line on

(f) Sedgwick street, from Division street to Chicago avenue.

Sixth. An application for a permit to install electric equipment for the operation of an overhead trolley on Madison street, between Clinton street and Ogden avenue, for the connection of the electric line on

(a) Ogden avenue, between Madison street and South Fortieth avenue, with the electric line on

(b) Clinton street, between Randolph and Twelfth streets, and the electric line on

(c) Madison street from Clinton street to Fifth avenue.

Seventh. An application for a permit to install electric equipment for the operation of an overhead trolley on Blue Island avenue, between Twelfth and Halsted streets, for the connection of the electric line on

(a) Twelfth street, between Ogden avenue and Blue Island avenue, and the electric line on

(b) Taylor street, between Western and Fifth avenues, with the electric line on

(c) Harrison street, between Ogden avenue and Canal street.

After a careful preliminary examination of the ordinances involved, I had the benefit of an extended argument in support of said applications, presented by Messrs. W. W. Gurley and Henry Crawford, of counsel for the Union Traction Company and its receivers, and was assisted at said hearing by Messrs. Edwin Burritt Smith and John C. Mathis, special counsel for the Committee on Local Transportation, and have since that time carefully re-examined the whole subject matter.

Before discussing specifically the respective applications and the ordinances under which street railways have been operated on the respective streets therein referred to, I shall discuss briefly the so-called power ordinances, which applicants cite as conferring upon you authority to issue the permits in question. There are two such ordinances—one an ordinance to the North Chicago Street Railroad Company, passed January 28th, 1895 (Special Ordinances, p. 1523), and the other to the West Chicago Street Railroad Company, passed February 4th, 1895 (Special Ordinances, p. 1649). Section 11 of the former of said ordinances reads as follows:

“Permission and authority are also hereby granted to said company to operate its electric cars by overhead contact wires over and along any part or parts of its cable tracks so far as may be necessary in order to connect its electric line in any street with its electric line in any other street. This permission is granted merely and only for the purpose of enabling the said company to use its cable tracks for making a circuit

or perfecting a line or route which shall require the cars to use the cable tracks in making a proper and direct connection, and shall not be suffered or permitted to be so construed as to permit the use of cable tracks by electric cars in any way or manner which will tend to supersede the use of cable cars or lines by electricity."

"It is also expressly understood and declared that before any cable track shall be used by said company for the operation thereon of electric cars, it shall file with the Commissioner of Public Works a plan showing specifically the line of cable tracks which it is intended to use by means of electrical appliances, and from and in connection with which it must appear that such use of cable tracks by electrical appliances is not intended to, and will not, have the effect to supersede or interfere with the full use of such cable tracks by cable cars by the substitution of electric cars therefor and thereon."

Section 12 of the latter of said ordinances is in the same words.

These sections present questions of fact for your determination, and you are charged with an official discretion in the determination of such questions of fact; and your decision thereon is not subject to review, unless such discretion be exceeded or abused.

The limiting and prohibiting clauses of these ordinances are controlling upon the general granting clause, and if you come to the conclusion that the granting of these applications, or any of them, is not "necessary" for the purpose of making such "direct connection", or that it even "tends" to supersede the use of cable cars or lines, by electricity, it will be your duty to deny such applications on such ground alone. Upon this question of fact I express no opinion, but shall proceed to the examination of the legal rights of the applicants in the streets involved in their said applications.

These are all applications to electrify cable lines; and, at the outset, it must be apparent that unless the applicants have a valid existing grant of the right to operate a street cable railway on that portion of the street upon which they seek to install electric equipment, you are without authority to issue a permit to electrify such portion of the line.

The first examination in logical order, therefore, is: What are the fundamental ordinance rights of the applicant for the maintenance and operation of cable street railways in the streets sought to be equipped with electricity?

The applications above referred to state that the purpose is not to change the method of transportation on the street sought to be electrically equipped, but to connect two or more electric lines over a cable line. The question of the validity of the franchise ordinances for the operation of said electric lines so sought to be connected is therefore of direct importance, and if the applicants lack power to thus operate the lines so sought to be connected, or connectable portions thereof, the application in such case must be denied.

I shall take up said ordinances in the order in which they appear in the first paragraph of this opinion.

I.

THE APPLICATION FOR THE INSTALLATION OF ELECTRIC APPLIANCES OVER THE CABLE TRACKS ON LINCOLN AVENUE, BETWEEN WRIGHTWOOD AND FULLERTON AVENUES.

The original ordinance authorizing the construction and operation of a street railway between Wrightwood and Fullerton avenues, was passed September 25th, 1876 (Special Ordinances, p. 1433), and is as follows:

"Be it ordained by the Board of Trustees of the Town of Lake View that authority and permission be, and is, hereby given to the North Chicago City Railway Company to extend their railway in Lincoln avenue, in the City of Chicago, by single or double track, with necessary switches and turnouts, from the present terminus at Fullerton avenue, along Lincoln avenue in the said Town of Lake View, to Wrightwood avenue, in said town, and to maintain and operate the same."

On August 2d, 1886, the Trustees of the Town of Lake View passed an ordinance authorizing the said North Chicago City Railway Company to operate its cars on said portion of Lincoln avenue, by cable power. Neither of these ordinances specifies any term of grant. Both were passed after the adoption of the Constitution of 1870, after the enactment of the

Horse and Dummy Act, in force July 1st, 1874, and long after the "Ninety-nine Year Act" of February 6th, 1865.

Upon the argument above referred to, made on behalf of the applicants, it was urged that both of these were grants running in perpetuity.

If this claim of counsel for the receivers were, for the sake of argument only, to be conceded, and the language of the ordinance amounted to a perpetual grant, it would be absolutely void. No municipality in this State has, or then had, any power to grant perpetual rights in the public streets. Such a grant is *ultra vires* and void *ab initio*. The making of a street railway grant by a municipality is the exercise of legislative or governmental power delegated by the State, which since 1870 is, in my opinion, subject to the provision of Section 14, Article II., of the Constitution of 1870, forbidding the passage of any law "making any irrevocable grant of special privileges."

Viewing this application, therefore, from the standpoint of applicants' counsel, it must be denied.

It may be claimed, however, that such grant is not upon its face perpetual, and is therefore valid, at least until the municipality indicates its desire to terminate the grant. The decisions of the various courts of this country disclose two well defined lines with reference to the validity and extent of ordinances indefinite as to term: one, that they are *ultra vires* acts, and therefore void; the other, that they are revocable at will.

In my opinion it is not at this time necessary to determine which of these two doctrines is supported by the better weight of authority. I think that you as a ministerial officer have no right to assume that the municipality will desire to continue this ordinance even if it be regarded as not absolutely void, but as terminable at will. You ought, in my opinion, to grant no permits for the installation of new motive power which will materially change the status of the companies under an ordinance which is either invalid or may be terminated by the municipality at will, particularly in view of the fact that the applicants themselves have secured a restraining order preventing the City Council from *now* making any declaration of the termination of this grant. I am of opinion, however, that

the municipality has *already* expressed its intention to have all ordinances enacted prior to July 30th, 1883, terminate on July 30th, 1903.

In the first mentioned year a large number of street railway ordinances had expired, or were by their terms about to expire. The companies claimed certain rights under the "Ninety-nine Year Act", which claim was controverted by the city.

As a compromise of these differences an ordinance was passed extending all existing ordinances until July 30th, 1903. This extension ordinance did not then operate on the ordinance under consideration, for the reason that in 1883 the territory now under consideration was not a part of the City of Chicago, but the whole history of this compromise ordinance shows that the City of Chicago, speaking through its City Council, declared its position to be that it desired all existing ordinance rights to expire together on July 30th, 1903.

It is a familiar principle of law that municipal legislation applies to subsequently annexed territory, except so far as the annexation ordinance keeps the legislation of the former municipality alive.

Said ordinance of 1883, therefore, is to be regarded as a legislative declaration of a general policy, which, on the annexation of the territory under discussion, became applicable thereto. For the purposes of the present question, therefore, I think that it is your duty to regard the ordinance of 1883 as the expression of a legislative intent, that it is the will of the municipality that the ordinance in question should not continue after July 30th, 1903.

It is also claimed by learned counsel for the receivers that this ordinance is extended by virtue of said "Ninety-nine Year Act."

As already stated, said Act was passed February 6th, 1865. In my opinion this Act is inoperative to extend the ordinance under consideration; first, because on its face said Act referred to contracts "made, entered into or given," and contains no specific reference to *future* ordinances of the City of Chicago; second, because the title of the Acts of February 14th, 1859, and February 6th, 1865, are, respectively, "An

Act to promote the construction of horse railways in the City of Chicago," and "An Act concerning horse railways in the City of Chicago," and the Constitution then in force provided: "No private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title." I am of the opinion that, at least, the parts of said Acts which attempted to authorize street railway grants *outside* of the limits of the City of Chicago are inoperative and void, because not within the scope of their titles.

For the reasons above stated, I believe that the application hereinbefore referred to should be denied on account of the infirmities of the fundamental ordinances for the operation of a street railway on said street.

The conclusion which I have thus reached makes it unnecessary to here discuss the ordinances for the electric line sought to be connected over said cable track. I have, however, examined each one of said ordinances with great care and will simply state the result of my examination.

Lines (a) and (b) in the above schedule, Lincoln avenue and Sheffield avenue, are subject to the same infirmities as the cable lines above discussed. In addition to this, the Sheffield avenue ordinance was passed two days before the election annexing the City of Lake View to Chicago; was approved two days after, and accepted by the railway companies eight days after said election. In New York it has been held that ordinances passed under similar circumstances are void.

Line (c) Lincoln avenue, between Fullerton and Webster avenues, has expired for reasons which will hereafter be stated.

Line (d) North Halsted street, has not yet expired, but since all of the other electric lines susceptible of connection therewith over said Lincoln avenue and said Lincoln avenue line itself, have expired, the situation is in no wise altered by the existence of this single unexpired ordinance.

II.

LINCOLN AVENUE, BETWEEN WEBSTER AND GARFIELD AVENUES

The ordinance for the north end of Lincoln avenue, to the North Chicago City Railway Company was passed May 8, 1871, accepted June 5, 1871. (Special Ordinances, p. 1425.) The route was therein described as follows: "Commencing at North Clark street and running west on Center street to Lincoln avenue, and thence along said avenue to the present or future limits of the city." Since the companies constructed their line on Lincoln avenue north of the then limits of the City of Chicago under other ordinances, it is immaterial to consider the construction of the words, "future limits of the city." Said ordinance contains the following section:

"Sec. 2. The permission and authority hereby granted are made subject to all the restrictions and conditions, the rights and privileges, mentioned in the ordinance passed by the Common Council on the 23d day of May, 1859, entitled 'An ordinance authorizing the construction and operation of horse railways in the north division of the City of Chicago,' and all contracts by and between the Common Council of the City of Chicago and the North Chicago Railway Company" (not North Chicago City Railway Company) "applicable to the line of said railway on North Clark street, shall be, and is, hereby extended to its said line on said Center street and Lincoln avenue."

In the resolution of acceptance, passed June 5, 1871, occurs the following sentence:

"Resolved, That the North Chicago City Railway Company hereby accepts said ordinance, and assents to the proposition herein contained; provided, that said ordinance be construed to mean that said railway company may have the same rights and privileges that it now has on North Clark street, shall be subject to the same conditions and restrictions now imposed on said company on North Clark street, and may use parts of streets designated in said ordinance for the same length of time it is now authorized to use North Clark street, and that the Common Council assent to this construction."

On May 6, 1872, the City Council passed the following resolution:

“Resolved, That the City of Chicago assent to the acceptance, by resolution of June 8, 1871, of the ordinance authorizing it to use parts of Center street and Lincoln avenue, passed May 8, 1871, and approved May 15, 1871, but the time for which said company may use said parts of streets, as provided in the ordinance, is fixed at twenty-five years from and after the passage of the ordinance. . . . Provided, that nothing herein contained, or in the original ordinance, shall be so construed as to give the sanction, consent or assent of this Common Council to the ninety-nine year franchise claimed by said railway company, or any other horse railway company, under the act of the General Assembly, entitled ‘An Act concerning horse railways in the City of Chicago,’ passed over the governor’s veto February 6, 1865.”

An examination of the ordinance of 1859 shows that the term therein granted was “twenty-five years and no longer.” This ordinance may therefore be read as though it contained the same provision, namely, that it should be in force and effect for twenty-five years from May 8, 1871, and no longer. It is claimed by counsel for the receivers that the ordinance for this part of Lincoln avenue, passed May 8, 1871, is extended by the “Ninety-nine Year Act”; that is to say, their proposition is that the act of February 6, 1865 (amending the act of February 14, 1859), had prospective force and effect to operate upon and extend the ordinance under consideration, passed *long after* the date of said act and containing the specific term of “twenty-five years *and no longer*”, notwithstanding the fact that the passage of said ordinance and its acceptance was followed by a resolution of the City Council that nothing therein contained or in the original ordinance should be construed “to give the sanction, consent or assent of this Common Council to the ninety-nine year franchise claimed by said railway company,” under the act of February 6, 1865.

Whatever may be said about the effect of the “Ninety-nine Year Act” upon ordinances prior to said act, surely no reasonable interpretation thereof can extend its application to

ordinances enacted long thereafter, which were accompanied by a formal protest on the part of the municipal legislative body, that they were passed without assent to the claims of the company under said act, and for a term of twenty-five years and no longer.

I am, therefore, of the opinion that the ordinance for the operation of a street car line on Lincoln avenue from Fullerton avenue to Center street was not extended by the "Ninety-nine Year Act", or the act thereby amended, and that the same expired on July 30, 1903.

What has been said with reference to the expiration of the ordinance governing the north end of Lincoln avenue makes it unnecessary here to discuss in detail the ordinances for the electric lines sought to be connected over the last mentioned portion of said Lincoln avenue cable line. Said ordinances, however have been carefully examined, and it will be sufficient here briefly to state the result of that examination.

The electric lines on Lincoln avenue north and south of the portion of the Lincoln avenue cable line above discussed (lines "a" and "c" *supra*) are under the same ordinances already examined and have expired. The Webster avenue line ("b" *supra*) is governed by an ordinance of the City Council passed March 25, 1878, has expired according to its terms, and for the reasons which I have already stated, was not extended or affected by the so-called "Ninety-nine Year Act", passed more than thirteen years prior to said ordinance.

I am of the opinion, therefore, that the second of the applications above referred to should be denied.

III.

DIVISION STREET, BETWEEN ORLEANS STREET AND WELLS STREET

The portion of this line referred to in the above application is included within the ordinance of May 23, 1859 (Special Ordinances, p. 1415), authorizing the operation of street cars on said Division street, from Clark street to Clybourn ave-

nue. This ordinance is generally known as the North Clark street ordinance. It embraced many other streets than those which I have above mentioned; the term of the grant was stated to be twenty-five years from the passage of this ordinance and no longer; it expired according to its terms on May 23, 1884, and by the ordinance of 1883 was extended to July 30, 1903. This ordinance, it will be noted, was passed after the act of February 14, 1859. Said act, it will be remembered, authorized the North Chicago City Railway Company to construct and operate railways on such streets, and in such manner and upon such terms as the City Council has prescribed or may prescribe. Said act, therefore, if not invalid for certain fundamental objections which have been made against it, not now necessary to discuss, authorized the North Chicago City Railway Company to receive, and by implication the City of Chicago to grant, this ordinance for a term of twenty-five years. The ordinance, however, was prior to the amendatory act of 1865. It therefore now becomes necessary to consider the effect of said act upon then existing ordinances.

The acts of February 14, 1859, and February 21, 1861, were by said act of February 6, 1865, amended by extending the corporate life of the Chicago City, the North Chicago City and the Chicago West Division Railway Companies from twenty-five to ninety-nine years. Section 2 of said act of 1859, which was also incorporated into the act of 1861, was amended by Section 2 of the act of 1865 by adding thereto the following words:

“And any and all acts or deeds of transfer of rights, privileges or franchises between the corporations in said several acts named, or any two of them, and all contracts, stipulations, licenses and undertakings, made, entered into or given, and as made or amended by and between the said Common Council and any one or more of the said corporations, respecting the location, use or exclusion of railways in or upon the streets or any of them of said city shall be deemed and held and continued in force during the life hereof as valid and effectual to all intents and purposes as if made a

part, and the same are hereby made a part of said several acts."

While the original acts of 1859 and 1861 incorporated companies and granted them certain general powers to be exercised in the future, these powers were to be granted "in such manner and upon such terms as the Common Council has prescribed or may prescribe." The amendatory act of 1865 extended the corporate life of those corporations from twenty-five to ninety-nine years, and provided that "all contracts, stipulations, licenses and undertakings made, entered into or given, and *as made or amended* by and between the said Common Council and any one or more of said corporations respecting the location, use or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held continued in force during the life thereof, as valid and effectual to all intents and purposes as if made a part and *the same are hereby made a part of said several acts.*"

The words "as made" mean that the ordinances shall be continued in force in the form and manner in which they were made; the words "or amended . . . by the Common Council" mean in the form established by amendment of the City Council and not as amended by the legislature.

Moreover, said act does not "*extend*" any ordinance, not even those ordinances enacted prior to its passage. It did purport to extend the corporate life of said companies; but, when it came to deal with the ordinances, it is noticeable that the legislature simply says that said ordinances "as made or amended . . . shall be deemed and held and continued in force during the life hereof . . . and the same are hereby made a part of said several acts."

I am of the opinion that said act only operated (if at all) to extend the *charter of the corporations therein mentioned* for a term of ninety-nine years from February 14, 1859, and February 21, 1861, respectively, but that the language used was not sufficient to extend the *term of the ordinances previously granted*. I am confirmed in this view by the following language of said act of 1865: "And the same are hereby made a part of said several acts."

I believe that the natural meaning of this language was to preserve said ordinances "as made" and to read them into the act of 1865, without alteration or extension. How else could said ordinances "as made or amended" by the "Common Council" have been "made a part of" said acts?

I have not overlooked the fact that one of the ablest lawyers who has served the City of Chicago as its corporation counsel, and who is now serving with distinction as judge of our Appellate Court, reached a different conclusion. I have most carefully read and reread his opinion of July 19, 1883; but, with all due respect, I find it impossible to concur in what he says as to the extension of city ordinances by the act of 1865. On this point Judge Adams says that the effect of the act of 1865, if constitutional, was, first, to extend the charters of the companies mentioned in said act; and, second, "to extend all grants made by the Common Council to the said railway companies, respectively, prior to the passage of the act . . . to the times, respectively, to which the charters of the companies were extended by the act." In another place he says that the effect of the language used in Section 2 was to make all prior ordinances parts of the acts of 1859 and 1861, and that "the acts are to be read as if the ordinances, which are made parts of them, were set out at large in them, with the modification that the times fixed for the operation of the railways in the ordinances . . . are to be read ninety-nine years from February 14, 1859, and . . . ninety-nine years from February 21, 1861."

This interpretation is, in my opinion, contradicted by the language of the act itself. The fact that the ordinances "*as made or amended by . . . the Common Council*" were "made a part of said several acts", contradicts Judge Adams' interpretation. He reads the words "ninety-nine years" into each of said ordinances, and then reads the ordinances, as if thus amended and extended by the legislature, into said acts. The words "as made or amended by the said Common Council" forbid any such interpolation. The words "and the same are hereby made a part of said respective acts" repel the idea of an extension. They are necessary and operative only to preserve the ordinances "as made or amended . . .

. by the said Common Council." The language of the act has given rise to much misunderstanding, but I believe that the application of two fundamental principles of construction will give it an interpretation removing its uncertainties and ambiguities and harmonizing all its parts. First, in case of doubt or ambiguity, a statute is to be read, if possible, so as to harmonize all its parts; second, a statute is to be strictly construed in favor of the public as against private interests.

In the application of the first principle, the courts have read words out of a statute, read words into it, changed affirmative words to negative, and negative words to affirmative. I believe that a proper construction of the acts of 1865 compels the reading of the word "thereof" in lieu of the word "hereof," so that the portion of the same under consideration would read: "All contracts . . . made . . . and as made or amended, by and between the said Common Council and . . . said corporations, respecting the location, use or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force during the life *thereof*, as valid and effectual, to all intents and purposes as if made a part, and the same are hereby made a part of said several acts." The use of the word "hereof" instead of "thereof" is the cause of the ambiguity. If, in obedience to the fundamental canon of construction above referred to, the word "hereof" be changed to the word "thereof," all uncertainties and absurdities disappear and all portions of the act are harmonized. The clauses above referred to which contradict the use of the word "hereof" harmonize with the use of the word "thereof." The provision that the ordinances "shall be deemed and held and continued in force during the life *thereof*," is plainly consistent with the provision making said ordinances a part of the acts. This interpretation is also in harmony with the other equally well established canon of construction that statutes are to be strictly construed in favor of the public as against private interests.

The conclusion above announced renders it unnecessary to discuss in detail the ordinances for the electric lines sought

to be connected over the above mentioned portion of the Division street cable, but a careful examination of the ordinances for said electric lines shows that:

(a) The Division street electric line next east and west of the cable line sought to be converted is governed by the same ordinance above discussed, and has therefore expired, and that the portion west of Clybourn avenue has not yet expired, but cannot be operated over the cable tracks sought to be converted without passing over track the ordinance for which has expired.

Lines (b) and (c), Sedgwick and Division streets, have already been discussed above, and have expired.

I am, therefore, of the opinion that you should deny the application for permit to install electric equipment for the operation of an overhead trolley on Division street between Orleans (formerly Market) and Wells streets, for the connection of the electric lines above referred to for the reason that the ordinance authorizing the operation of the cable road on said portion of Division street so sought to be electrified has expired.

IV.

WELLS STREET, BETWEEN NORTH AVENUE AND MICHIGAN STREET

The portion of this line referred to in the above application is included within an ordinance of October 26, 1874 (Special Ordinances, p. 1427-), and an amended ordinance of April 26, 1875 (Special Ordinances, p. 1430). The clause in regard to the term of the grant is as follows:

“Sec. 8. The right to operate said railway shall extend to the first day of October, A. D. 1894, at which time the rights and privileges herein and hereby granted to said company shall cease; but said company operating said railway at said time shall be entitled to enjoy all of such rights and privileges after the expiration of said time and until the Common Council shall hereafter elect, by order for that purpose, to purchase said tracks of the said railway, cars, carriages, furniture and implements of every kind and description used in

the construction and operation of said railway, and pay for the same in the manner hereinafter mentioned."

The first of the two ordinances above referred to describes the grantee as the "North Chicago Railway Company." There was no such company in existence, and said ordinance was never accepted. An amended ordinance was then passed, and, so far as I can see, the sole reason for the amendment is the insertion of the name of the North Chicago City Railway Company as grantee, in lieu of the name erroneously put in the first ordinance. Said amended ordinance was never formally accepted, but the road was constructed, by the grantee therein named, after its passage. The date of the amended ordinance, as already stated, is April 26, 1875. This was three days after the adoption of the Cities and Villages Act by the City of Chicago on April 23, 1875. Even if the Horse and Dummy Act of 1874 had no application to this grant, the adoption of said Cities and Villages Act made it unlawful for the city to grant a street railway franchise for more than twenty years. I am therefore of the opinion that at least the portion of said ordinance above quoted which authorized said company "to enjoy all of such rights and privileges after the expiration of said time and until the Common Council shall hereafter elect, by order for that purpose, to purchase," etc., is void as an *ultra vires* act, and said ordinance has expired.

Another consideration should be born in mind. This application is to electrically equip cable tracks on Wells street, from North avenue to Michigan street; but the cable track ends at Illinois street, and there is no cable track to equip with electricity on Wells street between Illinois and Michigan streets. That portion of the track is dead track, the use of which has been abandoned, and no rights of the applicant in said portion of said street should be recognized by you in any event.

Although the conclusion which I have thus announced makes it unnecessary to discuss the electric lines sought to be connected over said cable line, I have none the less carefully examined all of said ordinances and find that (a) the North avenue line has not expired; but (b) the Illinois street track

is not equipped with electric power and is dead track; and (c) the Wells street and Fifth avenue lines south of the portion sought to be converted are governed by the ordinance of April 26, 1875, above discussed, and have expired.

I therefore conclude that the application to install electrical equipment on Wells street, between North avenue and Michigan street, should be denied, for the reason that the ordinance for the operation of street cars on said portion of said street has expired, and that a portion of said street is dead track.

V.

CLYBOURN AVENUE, BETWEEN DIVISION AND HALSTED STREETS

The portion of this line referred to in the above application is included within the ordinance of May 23, 1859 (Special Ordinances, p. 1415), authorizing the operation of street cars on said Clybourn avenue, from Division street to Fullerton avenue. Said ordinance has already been fully discussed in connection with the Division street application (III, *supra*), and in my opinion the right to operate the tracks now in question has expired.

Although as before stated, in view of the conclusion thus reached, a discussion of the ordinances for the electric lines is not necessary, it may not be deemed out of place to again state that a very thorough examination of such ordinances discloses the fact that lines (a) Clybourn avenue, (d) Larabee street, (e) Division street, (f) Sedgwick street, have expired; and that lines (b) North Halsted street, and (c) North avenue, have not expired; but that there are no connectable portions of said electric lines supported by valid and unexpired ordinances.

For the reason that the ordinance for that portion of the Clybourn avenue cable line so sought to be equipped with electricity has expired, I am of the opinion that you should deny the fifth of the applications referred to above.

VI.

MADISON STREET, BETWEEN CLINTON AND OGDEN AVENUE

The original ordinance authorizing the operation of a street railway on Madison street was the ordinance of August 16, 1858, granting to Henry Fuller, Franklin Parmelee and Liberty Bigelow, authority to construct and operate street railways, by animal power only, on various streets within the limits of the then City of Chicago, including Madison street, from State street to Western avenue. (Special Ordinances, p. 1042.) It was provided that said grant should extend to the full time of twenty-five (25) years, and until the City Council should elect to purchase and pay for the same, the price to be fixed by arbitration. At this time there was no statute authorizing the City of Chicago, or any municipal corporation within the State of Illinois, to grant the right to operate street railways, and the validity of this ordinance was called in question. On account of the doubt thus raised as to the validity of this grant, the legislature of Illinois was induced to pass, on February 14, 1859, an act constituting the persons above named and another, a body corporate and politic by the name of "The Chicago City Railway Company", for the term of twenty-five (25) years. Section 2 of said act authorized said corporation to construct and operate street railways in the City of Chicago as the City Council of said city had already or might thereafter authorize said corporation so to do. It is not claimed that said act of 1859 extended the terms of the ordinance previously granted, but simply that it validated the same and gave said company lawful authority to exercise the rights therein attempted to be granted by the city to said corporation. I have already stated at considerable length my views as to the effect of the amendment of 1865, and here merely repeat that, in my opinion, said act was not operative to extend even those ordinances theretofore passed and therein referred to; that at most the corporate life of the companies was extended; and that the then existing ordinances, as made, were simply declared to be made a part of the act; that is to say, for the period of time in said ordinances prescribed.

By an ordinance passed March 30, 1888, accepted April 21, 1888 (Special Ordinances, p. 1372), the Chicago West Division Railway Company, its lessees and assigns, were authorized to equip their lines, including the one in question, with underground cable machinery.

Section 9 thereof reads as follows:

“Sec. 9. This permission and authority hereby conferred, are given upon the express understanding and agreement that the provisions of this ordinance shall, and does, not extend the time during which the said Chicago West Division Railway Company may operate its lines upon the streets of Chicago. The said privileges are to be governed in this respect *by ordinances heretofore passed.*”

This ordinance was accepted by said company, and in my opinion such acceptance conclusively evidenced the acceptance of the provisions of said Section 9, and, if said ordinance has any validity at all, it is a valid contract between the City of Chicago and the said company, its successors and assigns, that the privileges conferred, including the term of the grant, should be governed by the ordinances previously passed. I think that the words “ordinances previously passed” include the original grants and the “blanket extension ordinance” of 1883; but, in streets controlled by the ordinance of August 16, 1858, with provisions for municipal purchase incorporated into the acts of 1859 and 1861 by the act of 1865, I have considered the reference to be to the original ordinance. As already seen in this case, the original ordinance previously passed provided for a term of twenty-five years, and until the city should purchase. Even if the act of 1865 operated to extend that grant, it was certainly competent for the city and the railway company to shorten or altogether rescind the same, and in my opinion this provision in the ordinance of 1888 is conclusive upon the companies as a limitation of all their then existing rights to the term mentioned in their original ordinances. I cannot assent to the proposition that the ninety-nine year act postponed the exercise of the right of municipal purchase to the end of the ninety-nine year period. This is a forced conclusion, contrary

to the language of the act of 1865, which incorporated said ordinance into the former acts "as made."

I incline to the opinion that the acts of 1859 and 1865 validated said ordinance, including the municipal ownership clause, and read it into said acts "as made", that is to say, with the privilege of municipal purchase. Passing, therefore, as I have throughout, all constitutional questions as to the power of the legislature to pass said acts, said ordinance should be treated as a valid and subsisting ordinance, subject to termination by purchase, for which purpose the Mueller Law has now for the first time established a practical method.

The conclusion which I have thus reached, now makes it necessary to carefully consider the status of the lines sought to be connected over this portion of Madison street.

(a) Ogden avenue, between Madison street and South Fortieth avenue.

The ordinance for the operation of a street railway on Ogden avenue, from Madison street to Western avenue, was passed February 28, 1876. (Special Ordinances, p. 1335), and provided for a term of twenty (20) years from the date of passage and until the city should purchase; but this ordinance was passed after the City of Chicago had adopted the Cities and Villages Act, and, as already stated, I am of the opinion that the adoption of said act limited the right of the city to grant any sort of a street railway privilege for more than twenty years, and that so much of this ordinance as provided for the operation thereof after twenty years, and until the city should purchase, is void.

The ordinance for the other portion of Ogden avenue under consideration, to-wit: from Western avenue to West Fortieth street, is governed by the terms of an ordinance passed February 7, 1881 (Special Ordinances, p. 1360), for a term of twenty years, subject to the provisions of the ordinance of February 28, 1876, above referred to, and, in my opinion, is governed by the same rules of law which I have applied to that ordinance. I believe, therefore, that the right to operate the Ogden avenue line from Madison street to Fortieth street expired on July 30, 1903; and that you are not obliged to issue any permits for the equipment of Madison

street with electric wires for the purpose of authorizing the operation over the Madison street tracks of cars from Ogden avenue.

(b) Clinton street, between Randolph and Twelfth streets.

The ordinances for the operation of a street railway on this portion of this street are as follows: One passed March 28, 1864, authorizing the construction and operation of a temporary track, from Madison street to Randolph street (Special Ordinances, p. 1319), and providing for the removal of said track on the completion of the Randolph street bridge.

On July 11, 1864, an ordinance was passed (Special Ordinances, p. 1321), amending said ordinance by striking out the provisions for a temporary use only of said Clinton street, and providing that the ordinance of March 28, 1864 (Special Ordinances, p. 1320), in regard to a street railway on North Halsted street, be applied to the railway on Clinton street. The ordinance last mentioned refers by implication to the Desplaines street ordinance, passed May 23, 1859, and, as already several times stated in my opinion, the rights granted by this ordinance of May 23, 1859, have expired. I therefore conclude that in any view of the case, the Clinton street ordinances, above referred to, have expired.

The balance of Clinton street is governed by the ordinance of August 17, 1864 (Special Ordinances, p. 1322), and need not be further discussed.

(c) Madison street, from Clinton to Fifth avenue.

This portion of the Madison street line rests on the ordinance of 1858, above discussed, but cannot be connected with the other electric lines above named, because they have expired; and cannot be connected with the Madison street cable without passing over that portion of Madison street between Clinton and Jefferson streets, where there is no cable line and where the ordinance of 1895 has no application.

I therefore conclude that even if the ordinance for the operation of a cable line on Madison street, from Clinton street to Ogden avenue, has not yet expired, it is terminable at the will of the city, by purchase; and that there are not in existence two other valid and unexpired ordinances sup-

porting two electric lines capable of connection over said portion of Madison street; and that therefore said application should be denied.

VII.

BLUE ISLAND AVENUE, BETWEEN TWELFTH AND HALSTED STREETS

The portion of this line referred to in the above application for permission to install electric appliances is included within the terms of the ordinance of May 25, 1859, to the Chicago City Railway Company (Special Ordinances, p. 1046). The term of the grant was "during all the term in the said act of the 14th of February, A. D. 1859, specified and prescribed."

If it be conceded that the reference in the ordinance was to the term mentioned in said act as the corporate life of the Chicago City Railway Company, the ordinance may be considered as written with an express term of twenty-five years. I have already stated very fully my views in reference to the effect upon a similar ordinance of the same date, to the North Chicago City Railway Company, and merely here repeat the conclusion that the act of 1865 did not, in my opinion, operate to extend the term of the ordinance now under consideration, but merely validated the same and read it into the act as made, preserving all its provisions and conditions, including that of the term of the grant.

I am therefore of the opinion that the ordinance under consideration terminated on July 30, 1903.

This conclusion makes a detailed discussion of the ordinances for the electric lines sought to be connected over the Blue Island avenue cable, here unnecessary. A careful examination of the ordinances for said lines has, however, been made and discloses the fact that (a), the Twelfth street line has expired; (b), the Taylor street and (c), the Harrison street lines, have not yet expired, but inasmuch as in this case, also, there are not three valid and unexpired ordinances, capable of connection in the manner applied for, and particularly because the ordinance for the cable line has expired, I

am of the opinion that the seventh and last application should be denied.

I have now examined the fundamental ordinances for each of the cable roads sought to be electrically equipped, as well as the fundamental ordinances for the electric lines sought to be connected over said cable lines by said electric equipment, and while ordinances have been found which have not yet expired, no case is presented in which, in my opinion, there are the three valid and unexpired ordinances requisite to entitle the applicants to the permit asked for, to-wit: ordinances for two electric lines, susceptible of connection over a cable line, and an ordinance for such cable line.

You will observe that I have confined the foregoing to the construction of the ordinances and statutes involved; and that I have treated such ordinances and statutes as valid upon their face, except only those ordinances which purport to run for a longer term than was permitted by law. I have not discussed many questions that might be raised, because upon the face of the ordinances and statutes involved I believe that conclusive reasons have been found for advising you that you are without authority to grant the permits.

It has been suggested by counsel for the receivers that these permits might properly be granted without prejudice to the rights of the city or of the applicants in regard to any of the matters in dispute between them. I feel compelled, however, to express the opinion that you cannot accept this suggestion. In a matter like this, involving a material change of the status of the transportation companies in their relations to the city, at a time when these relations are in dispute and the subject-matter of litigation, you have, I believe, no discretion to consider anything more than the strict legal rights of the applicants. In my opinion, this suggestion can only be considered by the City Council, and should be referred to that body.

I transmit herewith a plat showing the lines involved in the above named applications, in which the cable lines sought to be electrically equipped are marked in green, other cable lines in blue, and electric lines in red. It may be of assistance

to you in following the discussion of ordinances herein and in passing upon the questions of fact referred to above.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

NOVEMBER 17, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At the meeting of your honorable body held November 16, 1903, the following order was passed:

“ORDERED, That the Corporation Counsel render an opinion as to whether to escort a street car operated during a strike of the street railway employes on the line operated, with a dozen policemen, more or less, is a proper use of the police department.”

In answer to your request I beg leave to say:

The mere reading of the following quotations from the statutes of this State suffices without further argument to demonstrate that the Mayor not only has the power but that it is his duty to use all reasonable means within his power for the preservation of the peace and to prevent the destruction of property, and for this purpose to make any lawful use of the police force in the preservation of the peace and the protection of property which will conduce to the accomplishment of that end. There is no statute, nor any principle of the common law, nor any decision of any court, holding that the police may not escort a street car or ride thereon for the purpose of preserving the peace or preventing the destruction of property. Street cars operating upon the public streets partake of the public character of such streets. Such cars are “public places”, within the meaning of that term as used in the law. If for the discharge of the Mayor’s duty to preserve the peace and protect property he deems it necessary to put the police force on street cars operating upon the public streets, the existence of the necessity affords him *a power as broad as the need.*

The statutory provisions above referred to are as follows:

Ch. 24, Article 11, R. S. Illinois:

"Sec. 1. The chief executive officer of a city shall be a Mayor, who shall be a citizen of the United States, a qualified elector, reside within the city limits, hold his office for two years, and until his successor is elected and qualified."

"Sec. 8. He may exercise, within the city limits, the powers conferred upon sheriffs, to suppress disorder and keep the peace."

"Sec. 10. He shall perform all such duties as are or may be prescribed by law or by the city ordinances and shall take care that the laws and ordinances are faithfully executed."

"Sec. 13. He shall have the power, when necessary, to call on every male inhabitant of the city, over the age of eighteen years, to aid in enforcing the laws and ordinances, and to call out the militia to aid in suppressing riots and other disorderly conduct or carrying into effect any law or ordinance, subject to the authority of the governor as commander in chief of the militia."

Ch. 125, R. S. Illinois, respecting sheriffs, contains the following clauses:

"Sec. 17. Each sheriff shall be conservator of the peace in his county and shall keep the same, suppress riots, routs, affrays, fighting, breaches of the peace, and prevent crime; and may arrest offenders on view and cause them to be brought before proper magistrates for trial or examination.

"Sec. 18. To keep the peace, prevent crime, or to execute any writ, warrant, process, order or decree, he may call to his aid, when necessary, any person or the power of the county."

Article VI of said Ch. 24 contains the following sections:

"Sec. 4. All officers of any city or village, whether elected or appointed, shall, before entering upon the duties of their respective offices, take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm, as the case may be,) that I will support the Constitution of the United States and the Constitution of the State of Illinois, and that I will faith-

fully discharge the duties of the office of according to the best of my ability, which oath or affirmation so subscribed shall be filed in the office of the clerk. . . .”

“Sec. 12. The trustees in villages, the Mayor, Aldermen, . . . and . . . policemen, . . . in cities . . . shall be conservators of the peace, and all officers created conservators of the peace by this act . . . shall have power to arrest, or cause to be arrested, with or without process, all persons who shall break the peace or be found violating any ordinance of the city or village, or any criminal law of the State, . . . and shall have and exercise such other powers as conservators of the peace as the City Council or Board of Trustees may prescribe. . . .”

Ch. 125, R. S. Illinois, respecting sheriffs, contains the following clauses:

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Article VI of said Ch. 24 contains the following sections:

“Sec. 4. All officers of any city or village, whether elected or appointed, shall, before entering upon the duties of their respective offices, take and subscribe the following oath or affirmation:

“I do solemnly swear (or affirm, as the case may be,) that I will support the Constitution of the United States and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of according to the best of my ability, which oath or affirmation so subscribed shall be filed in the office of the clerk. . . .”

“Sec. 12. The trustees in villages, the Mayor, Aldermen, . . . and . . . policemen, . . . in cities . . . shall be conservators of the peace, and all officers created con-

servators of the peace by this act . . . shall have power to arrest, or cause to be arrested, with or without process, all persons who shall break the peace or be found violating any ordinance of the city or village, or any criminal law of the State, . . . and shall have and exercise such other powers as conservators of the peace as the City Council or Board of Trustees may prescribe. . . .”

Ch. 38, R. S. Illinois, contains the following sections:

“Sec. 253. When twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more armed or unarmed, are unlawfully, riotously or tumultuously assembled in any city, village or town, it shall be the duty of each of the municipal officers, . . . to go among the persons so assembled, or as near to them as they can safely go, and in the name of the State command them immediately and peaceably to disperse; and if they do not obey, such officers shall command the assistance of all persons present, in arresting and securing the persons so unlawfully assembled; and every person refusing to disperse or to assist as aforesaid shall be deemed one of such unlawful assembly and shall be fined not exceeding five hundred dollars and confined in the county jail not exceeding one year, and each such officer having notice of such unlawful assembly and refusing or neglecting to do his duty in relation thereto, as aforesaid, shall be fined not exceeding two hundred dollars.”

“256a. That whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, . . . shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof.”

“Sec. 340. It shall be the duty of every sheriff . . . policeman or other officer of any incorporated city . . . having power of a sheriff or constable . . . to suppress all riots and unlawful assemblies and to keep the peace. . . .”

The constitutionality of Section 256a of Chapter 38 was sustained by the Supreme Court of Illinois in the case of

the *City of Chicago v. Manhattan Cement Company*, 178 Ill. 372.

Very respectfully,
EDGAR B. TOLMAN,
Corporation Counsel.

NOVEMBER 18, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have your communication of the 14th inst. requesting an opinion as to whether the alley leading into Winnemac avenue, between North Ashland avenue and Clark street, should be regarded as having the width provided for in the ordinance of July 7, 1890 (recorded June 16, 1897), i. e. twenty (20) feet, or the width shown by the plat of re-subdivision recorded December 10, 1897, i. e., sixteen (16) feet.

The rights of the public to the use of an alley twenty feet in width, as contemplated by the ordinance, became vested in the city for the use of the public some months before the recording of the plat of re-subdivision. Any informality or irregularity in permitting the recording of a plat of re-subdivision attempting to give a narrower width to the alley than the one provided for in the ordinance will not conclude the city's rights in the premises where no elements of an equitable estoppel exist. The only evidence before me tending to show an acquiescence by the municipal authorities in the establishment of a sixteen foot alley is the placing of "returns" in the entrance thereto on lines sixteen feet apart. Such evidence of acceptance by the city of the altered alley width at so recent a date from the re-subdivision I consider too slight to bar the city's claim, and you would be warranted in considering the city's rights as unaffected by this re-subdivision, so far as it concerns the width of this alley.

To prevent any question of prolonged acquiescence on the part of the city to a change in the original width of the alley, I would suggest that the proper authorities serve notice upon the owners of lots one (1), two (2) and three (3), block four (4), in this re-subdivision, to remove any obstruc-

tions now placed upon the strip along the east side of the alley.

Respectfully yours,
 JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:
 EDGAR B. TOLMAN,
Corporation Counsel.

NOVEMBER 19, 1903.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

I acknowledge receipt of your letter of the 12th inst., asking this department for an opinion as to whether or not Section 125 of the building ordinance is valid. Said section is as follows:

“Sec. 125. The use of any part of the sidewalks for steps or for open areas is prohibited, but porticos or other entrance features, if not more than thirty feet in height, may be made to project upon the sidewalk thirty inches, but no more. Provided, that where sidewalk space is less than fourteen feet, no projection shall be permitted, and provided that such projection shall only be as an architectural feature and shall in no case be used as a show window, vestibule or for business purposes.

“The foregoing prohibition for the use of sidewalk space for steps or areas shall not apply to existing buildings, but if material alteration in or additions to existing buildings are to be made, then such steps and open areas shall be made to conform to the provisions of this ordinance.”

There are numerous decisions of our Supreme Court holding that all public highways, from side to side and from end to end, are held for the use of the public, and that a city has no power or authority to grant the exclusive use of any of its streets to any private person or for any private purpose. The decisions further hold that it is the duty of the city to prevent and remove encroachments upon the streets, and declaring all such to be public nuisances.

I am of the opinion that the above section of the ordi-

nance is beyond the power of the council to pass, and is therefore invalid.

People v. Harris, 203 Ill., 272.

Yours respectfully,

MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

NOVEMBER 23, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At the meeting of your honorable body held November 16, 1903, you requested the opinion of the Corporation Counsel "on the right of the City of Chicago to furnish the people with gas or electric illumination."

Chapter 24 of the Revised Statutes of Illinois, Article V, Section 1, Clause 11, gives the city express power to provide for the lighting of the streets. The late Judge Drummond decided, in 1877, that this included the right to light the public buildings and offices and the construction of a gas manufactory. (*Garrison v. City of Chicago*, 7 Bissell, 480 (485).)

On October 31, 1887, Hon. John W. Green, the then Corporation Counsel, furnished the City Council with an opinion in which he said: "There can be no doubt that the city has legal right to erect, maintain and operate gas works, provided it confine its expenditures within the constitutional and legislative limit." (Opinions of the Corporation Counsels and Assistants, p. 106.)

For reasons more fully stated in my opinion of October 29, 1903, on the power of the City of Chicago to construct and operate a plant for the crushing of stone, to be used in the improvement of streets (printed on pp. 1368-1371 of the council proceedings of November 2, 1903), I am of the opinion, not only that the principles laid down by Judge Drummond and former Corporation Counsel Green are sound, and that the city may construct a plant for the manufacture of

gas or electricity for the lighting of the public streets, but also that it has the right to sell gas or electricity to the inhabitants of the city. I am unable to find any sound distinction between the power of the city in this respect and that which has been recognized and sustained by the courts in regard to the furnishing of water.

1st Dillon on Municipal Corporations, Sec. 27.

Wagner v. City of Rock Island, 116 Ill. 139 (154).

Schneider v. City of Menasha, 95 N. W. Rep. 94.

The *Menasha case*, *supra*, contains a most useful compilation of the modern cases supporting the right of the city to engage in business enterprises of the sort under consideration, and illustrates the tendency of the courts to extend the power of the municipality in carrying on such municipal enterprises of a business nature. It may fairly be said to be the modern doctrine that in such municipal enterprises, as distinguished from those involving the exercise of purely governmental functions, the city has like power to that of a private corporation or individual.

Very respectfully yours,

EDGAR B. TOLMAN,

Corporation Counsel.

NOVEMBER 23, 1903.

MR. B. W. SNOW, Chairman Sub-committee of the Judiciary Committee.

Dear Sir:

Replying to your favor of November 10, wherein you request this office to render an opinion as to the validity of a proposed ordinance requiring all underground work in streets to be done before the said streets are paved, I beg leave to say that I have given this matter careful consideration and my conclusion is that such an ordinance could be enforced.

Among the powers of the City-Council are the following:

"Section 2225. Clause Nine. To regulate the use of the same (streets).

"Clause Ten. To prevent and remove encroachments and obstructions upon the same."

"Clause Thirteen. To regulate the openings therein for

the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: Provided, however, that any company heretofore organized under the general laws of this State or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the Common Council (subject to existing rights) to erect gas factories and lay down pipes in the streets or alleys of any city or village in this State, subject to such regulations as any such city or village may by ordinance impose."

"Clause Sixty-six. To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

"Clause Ninety-six. To pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the City Council or Board of Trustees shall deem proper: Provided, no fine or penalty shall exceed \$200, and no imprisonment shall exceed six months for one offense."

Numerous cases are found in the books, holding that where the right of a gas, water, telephone, railway, or other company, to use the streets of a city or town, is derived, by charter, from the State or from the legislature, or is found in some constitutional provision, such municipality is without power to deny the exercise of such right, as the following examples will show:

Under the Constitution of California, Section 19, Article 11, which provides that:

"In any city where there are no public works . . . for supplying the same with water or artificial light, any individual or any company, duly incorporated for such purposes . . . shall under the direction of the Superintendent of Streets or other officer in control thereof and under such general regulations as the municipality may prescribe for damages and indemnity for damages have the privilege of using the public streets and thoroughfares thereof and of laying down pipes and conduits therein. . . ."

It was held that an ordinance requiring a permit for the laying of pipes or conduits was invalid.

In re Johnson, 69 Pac. 973;

People v. Stephens, 62 Cal. 209.

The statutes of New Jersey authorized telephone companies to use the highways subject to the proviso that the use of streets in the incorporated cities or towns should be subject to such regulations and restrictions as might be imposed by the corporate authorities of such cities and towns. Held, that an ordinance requiring a permit was invalid.

Summit v. N. Y. and N. J. Telephone Company, 51 N. J. Equity, 123.

The charter of a gas company authorized to use the streets of Atlanta to lay down pipes, provided "that the public thoroughfares shall at no time be unnecessarily interrupted or impeded by the laying down or erection thereof, and the said streets shall not be injured thereby, but shall be left in as good state and condition as they were before the laying down of said pipes." Held that an ordinance requiring a permit was invalid.

Atlanta v. Gas Light Company, 71 Ga. 106.

To the same effect also the following cases:

Telephone Company v. Benton Harbor, 121 Mich. 512;

Telephone Company v. Oshkosh, 62 Wis. 32;

In re Pittsburg, 115 Pa. 4;

Millvale v. Railway Company, 131 Pa. 1;

Railway Company v. Harrisburg, 149 Pa. 465;

State v. Flad, 23 Mo. App. 185;

Hodges v. Telegraph Co., 72 Miss. 910.

On the other hand, it is well settled that the consent of the corporate authorities of the municipality must be obtained unless it appears that the right to use the streets is derived from a higher source and is to be exercised independently of municipal control.

"Where general authority over streets and alleys is conferred on a municipal corporation, and there is no statute for the purpose of operating a railroad or for the purpose of digging trenches and laying pipe lines, the streets and

alleys cannot be used for such purpose without the consent of the municipal authorities."

Elliott, Roads and Streets, 332.

The same writer also lays it down that:

"When one acquires the right to use a street or highway for purposes of his own, the right is subject and must be enjoyed in subordination to the power of the public authorities to keep it in condition for public use, unless the express terms of the grant by which he acquired the right, or the nature of the right acquired by him necessarily excludes or limits such power."

Where a gas company was required by its ordinance to commence furnishing gas within a year and did not do so, it lost the right to lay pipes in the streets.

Chicago Gas Light & Fuel Company v. Town of Lake, 27 Ill. App. 346.

A grant of authority by the legislature to run a railroad through a town does not operate as a grant of the use of the streets or either of them for such purpose.

Railroad Company v. Haller, 82 Ill. 208.

It is to be noted, moreover, that the proposed ordinance does not seek to *deny* the use of the streets to public service corporations, but is only designed to *regulate* such use. It says to these companies, "You may dig in the streets, provided you do so before we put down a pavement; after that you will not be permitted to disturb the roadway, but you may dig outside the curb lines or in the unpaved alleys." In my opinion this is fairly within the province of *regulation*.

The only doubt which I have at any time entertained as to the power of the council to enforce an ordinance of this character has arisen with reference to the rights of the gas company. The Chicago Gas Light & Coke Company was incorporated by an act of the legislature approved February 12, 1849, which was amended by an act of February 9, 1855. The People's Gas Light & Coke Company was incorporated by an act approved February 12, 1855, amended by the acts of August 30, 1858, and February 2, 1865. (Laws and Ordinances of 1873, pp. 172-176.)

The charter of the Chicago Gas Light & Coke Company

gives the said company power to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, "provided that no permanent injury or damage shall be done," etc. Under this charter the said company had the right to lay pipes in the streets of Chicago regardless of the wishes or desires of the municipal authorities.

The charter of the People's Gas Light & Coke Company, on the other hand, provides that the said company shall have the right to "lay pipes for the purpose of conducting gas in any of the streets or avenues of said city with the consent of the *City Council*."

By an act of the general assembly in force July 1, 1897, commonly known as the Gas Consolidation Act, the various gas companies in the City of Chicago, with the possible exception of the Ogden Gas Company, were merged in the People's Gas Light & Coke Company. In the case of the *P. G. L. & C. Company v. Hale*, 94 Ill. App. 406, the court says that by virtue of said consolidation and by the statute under which it was made, the said company became and is vested with all the rights, privileges and franchises of the constituent companies under their ordinances, and is also bound by all the duties and obligations of the said companies. It is obvious, however, that this refers only to pipe lines which had prior to that time been laid by such constituent companies, and does not refer to new extensions made or to be made by the People's Gas Light & Coke Company, and the authority of the said company to lay new pipes is only that which is found in its own charter. As has already been shown, that charter gives said company the right to lay pipes, but subject to the consent of the City Council. The right to give consent necessarily implies the right to withhold it. My conclusion in this regard is supported by the opinion of Judge Grosscup in the case of *People's Gas Light & Coke Company v. City of Chicago*, 114 Fed. Rep. 384. The court says:

"The act of 1855 authorizes complainant to erect its works and lay its pipes in the streets and alleys of the city subject to the consent of the City Council. In the absence of consent, no pipes could have been laid. It is possible that the city may not in mere arbitrariness withhold its consent

where the consent asked for was in the ordinary development of complainant's plant," etc.

It seems to me that in view of the power of the City Council to regulate the use of the streets and in view of the benefits which would manifestly accrue to the taxpayers from the proposed ordinance in preventing the tearing up of expensive pavements and the damage which invariably and necessarily follows therefrom, it would be entirely reasonable for the Council to say that all companies desiring to lay pipes in the streets must do so before a new pavement is laid, and it could not, in my judgment, be said to be arbitrary for the city to withhold its consent to the laying of pipes in the roadway after such new pavement is laid.

As to all other companies or individuals using the streets for conduits or pipes of any sort, the city, in my opinion, has full power to regulate the time and manner of making excavations in the streets.

For the reasons indicated, I am of the opinion that the ordinance in question would be valid.

For the assistance and information of the committee I transmit herewith draft of an ordinance, somewhat different in its terms from the proposed ordinance, embodying a suggestion made by one of the aldermen with reference to consent of frontage owners; also copy of an ordinance drawn by the law department of the Board of Local Improvements some time ago at the request of said board.

Yours truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 23, 1903.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Under date of October 12, 1902, you requested this office to furnish you with an opinion as to whether or not license fees can be collected under Sections 1239 and 1240 of the Re-

vised Code of Chicago of 1897. The sections referred to read as follows:

“1239. License--Exception.] No person shall sell, offer for sale, barter or exchange, any carload, lot, or any less quantity of fruit, vegetables or farm produce, butter, cheese, eggs, game or poultry, from any railroad car, railroad freight depot, or warehouse, within the City of Chicago without first obtaining an annual license to engage in such business, under a penalty of not less than twenty-five nor more than one hundred dollars for each offense: Provided, however, the provisions of this section shall not apply to any farmer, gardener, fruit or vine grower engaged in selling the produce of his farm, garden, orchard or vineyard, nor to any commission merchant having a store house and established place of business in said city.”

“1240. License Fee.] Every person before engaging in the business or occupation mentioned in the preceding section shall pay to the City of Chicago an annual license fee of two hundred dollars in the manner provided by the ordinances of said city concerning licenses.”

An ordinance was passed on July 6, 1903, published on page 752 of the printed council proceedings of that date, prohibiting the sale of any of the articles mentioned in Sections 1239 and 1240 aforesaid, in less than carload lots, from any railroad car, railroad freight depot, railroad yard or public landing. A license could therefore be granted for the sale of such articles only in carload lots, if at all.

In determining whether or not Sections 1239 and 1240 are valid, the first question to be determined is whether or not the City Council had power to pass the same. If the council had the power it must be found in one or more of the following grants of power conferred in the Cities and Villages Act, R. S. Ill., Ch. 24, Art. V.:

Clause 4. “To fix the amount, terms and manner of issuing and revoking licenses.”

Clause 41. “To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure.”

Clause 50. "To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same."

Clause 53. "To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions."

Clause 66. "To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

Clause 78. "To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

Clause 62a. "Power to license, tax, etc., itinerant merchants, etc.] Sec. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That the City Council in cities, and the President and Board of Trustees in villages and incorporated towns, shall have power to license, tax, regulate, suppress or prohibit itinerant merchants and transient vendors of merchandise."

The sections in question cannot be justified under Clause 62a, for the reason that said section applies only to itinerant merchants. An itinerant merchant is defined to be "one who for a short space of time locates in a city and makes sale and delivery of his goods as other merchants do," or "one who carries or transports his goods from house to house or place to place and makes sale and delivery of his goods in like manner as other merchants or salesmen do." *Twining v. Elgin*, 38 Ill. App. 356.

Persons exercising the business or trade referred to in Section 1239 aforesaid, to-wit: that of selling in carload lots (or less) from freight cars, depots, etc., cannot be classed as "itinerant merchants", under the foregoing definition.

A city has no power to license merchants.

Holden v. Galena, 19 Ill. App. 409;

Cairo v. Bross, 101 Ill. 475.

In the case last cited it was held that the power to license and regulate certain occupations and kinds of business specifically enumerated prohibits the licensing of all trades and occupations not enumerated.

Clause 41 will not apply, because that refers to hawk-

ers, peddlers, etc., and one who sells goods from a car, depot or warehouse, is neither a hawker nor a peddler.

If, then, the city has power to license the business in question, it must be found in Clauses 50 and 53 in connection with the general police powers conferred by Clauses 66 and 78. Whether the power exists, or not, is not now necessary to be decided for Sections 1239 and 1240 are, in my opinion, fatally defective for the reason that they are not uniform in their application.

It will be observed that "commission merchants having a store house and established place of business in Chicago," are expressly excepted from the operation of Section 1239. Said section provides, in effect, that persons who are commission merchants, and have an established place of business, may, without a license, do that which persons not so situated must procure a license for doing. No difference is perceived between such a distinction, and one requiring non-residents to procure a license to peddle, while residents are exempted. It would, in my judgment, be just as reasonable to require red-haired persons to be licensed, and exempt persons whose hair is of some other color.

It has been many times decided that a "city cannot enact ordinances which are unreasonable, oppressive or such as will create a monopoly."

E. St. Louis v. Wehrung, 46 Ill. 393;

Tugman v. Chicago, 78 Ill. 405;

Lake View v. Tate, 33 Ill. App. 78;

City v. Hardy, 66 Ill. App. 524.

A license fee imposed upon a certain business or occupation must be uniform as to all persons of the same class.

Braun v. Chicago, 110 Ill. 186.

A city has no power to impose a license fee on non-resident peddlers where resident peddlers are exempt.

Braceville v. Doherty, 30 Ill. App. 645;

Twining v. Elgin, 38 Ill. App. 356;

Carrollton v. Bazette, 159 Ill. 284.

An ordinance prohibiting any one from carrying on the business of slaughtering, etc., after January 1, 1872, within a certain district, in any building which was not at that time

used for such purpose, was held to be void on the ground that it was unreasonable, oppressive and tended to create a monopoly.

Tugman v. Chicago, 78 Ill. 405.

An ordinance requiring all peddlers to procure a license, excepting persons manufacturing and selling their own products and who were *bona fide* residents of the city was held void because of inequality.

Lucas v. City of Macomb, 49 Ill. App. 60.

In the above case it was said that although an ordinance might be valid in part and void as to a part, still if it appeared that all parts of the ordinance were so connected that no part of it would have been adopted without the accompanying portions, then the whole ordinance would be held invalid.

If a statute or ordinance is in reality directed against certain persons who are engaged in a given business, or against certain commodities in such manner as to discriminate between persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such a statute or ordinance is not a police regulation, but a trade regulation, and is void.

Borough of Sayre v. Phillips, 24 Atl. 76 (Pa.);

Webber v. Va., 103 U. S. 344;

Ex parte Thomas, 12 Pac. 53 (Cal.);

Rogers v. McCoy, 44 N. W. 990 (Dak.);

Robey v. Smith, 30 N. E. 1093 (Ind.).

Upon reading Section 1239 one is almost inevitably forced to the conclusion that the ordinance was intended to discriminate in favor of certain persons, to-wit: those having a store house and established place of business, as against other persons engaged in the same trade or pursuit, but who have not a fixed place of business. It is reasonable to conclude that it is not intended that all persons dealing in the articles mentioned should pay the license fee of \$200 per year and that the section itself would never have been adopted without the proviso exempting commission merchants afore-said. It is therefore not a police regulation, but a trade regulation. If there are any evils incident to the sale of such

goods from cars, depots or warehouses, then the same evils would arise whether such sale was made by a person having a fixed place of business, or by one who has not. The section is, therefore, in my judgment, unreasonable, oppressive, and tends to create a monopoly.

For the reasons stated, I am of the opinion that Sections 1239 and 1240 aforesaid, are invalid and should be repealed.

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 27, 1903.

TO THE JUDICIARY COMMITTEE OF THE CITY COUNCIL OF THE
CITY OF CHICAGO.

Gentlemen:

Your sub-committee in conference with the law department and by a communication from its chairman dated the 13th inst., addressed to the Corporation Counsel, requested an opinion covering in substance the following points:

First. Has the Chicago Telephone Company the right under the ordinance of January 4, 1889, to charge its Chicago subscribers or lessees a "toll" or extra rate, in addition to the regular rent for service, for any telephonic connection with the wire or telephone of another subscriber or lessee whose telephone is likewise located within the city limits?

Second. Do the subscribers of the company who pay the maximum rates fixed by the ordinance, stand on a footing different from that occupied by patrons paying lesser rates for special or limited service, as regards "toll" charges?

Third. Would an ordinance abolishing "toll" charges inside the city limits on all calls from telephone subscribers within said limits, be valid?

Fourth. What would be the effect of such an ordinance, assuming its validity, upon the right of the City of Chicago to collect the compensation provided for in the ordinance of January, 1889?

It should be said by way of introduction that all subscribers within the *present* city limits and all wires, branch telephone exchanges and business of the company within such limits will be considered as unaffected by the fact that they are now within the city limits by reason of annexation of territory since January 4, 1889. The reasons for this assumption will be found in an opinion rendered the Deputy Comptroller, September 30, 1903, a copy of which is appended hereto.

A prefatory statement as to certain essential facts is also desirable before taking up these questions of construction.

The title of the ordinance of January 4, 1889 (Special Ordinances of Chicago, 1898, Sec. 872), describes it as "an ordinance authorizing the Chicago Telephone Company to construct, maintain and operate *a line* of telephone wires in the *City of Chicago*." In the first clause (or section) the right is granted to operate, etc., "*a line* or lines of wires or electrical conductors for the transmission of sound and signals."

Clause 3 provides that outside of the district described in Clause 2, where conduits are required, the company may "erect a *system of* poles and wires, in *any* of the streets and alleys in Chicago." The remainder of Clause 3 gives to the city the power to compel the company to place underground the wires *therein* mentioned, etc.

Clause 4 requires that when the wires outside the said district, etc., "are to be placed underground the said company shall for the purpose of *reaching* their subscribers and branch offices, have the privilege of bringing the said wires . . . to the surface," etc.

Clause 6 recites that "said company *during the term* for which this ordinance is granted, shall not *increase* to its present or *future* subscribers the *rates* for telephone *service now* established." It is also provided that the company shall file "a schedule showing the *rates* charged . . . for telephone *service* at the *date* of the passage of this ordinance within the *limits of the City of Chicago*."

In this same clause there is a provision for connecting the company's wires with the offices of the Mayor and other

city officials, etc., "so that said telephones may be used in connection with *all wires* under control of said company connected with its *exchange in the City of Chicago*."

There is a further provision reserving to the city its right to regulate "the rates to be charged by telephone companies for the *rental* of telephones or for the *licensing* of telephone companies . . . or to regulate the *prices* to be charged for telephones," but it is provided that upon the exercise by the city of these reserved rights "then the provisions of this section as to payment of revenue . . . to the City of Chicago shall cease to be binding upon said company." The revenue provisions referred to concern the payment to the city of a percentage of the company's gross receipts, and are discussed in said appended opinion furnished the Deputy Comptroller.

Clause 7 provides for the giving of a bond conditioned to pay damages "that may accrue from the laying, repairing, removing or operating said wires, conduits and *telephone system*."

Clause 9 prohibits the company combining with any other telephone company "doing business in Chicago concerning the *prices* to be charged for telephone *service*. Nor shall said company make any *transfer* or *division* of the *territory*, streets or avenues of the city, with any other . . . corporation doing business in *said city* for the *operation* of or supplying of telephone service."

There was filed in the City Clerk's office on January 8th, 1889, a document reciting that it is a "schedule showing the rates charged by the Chicago Telephone Company for telephone service on the 4th day of January, 1889, within the limits of the City of Chicago." To the schedule a map is attached marked with blue lines. The schedule states that "within the blue lines on the map of Chicago attached hereto and made a part hereof, we charge one hundred and twenty-five (\$125) dollars per annum for telephone instruments connected by wire with our exchange, for the business use of the lessee and his employes alone. For the same connection, to be used as a public telephone, with a right to permit the use to the general public and charge therefor ten cents for a *local*

connection, we charge twenty-five (\$25) dollars increase on the above price. We charge one hundred (\$100) dollars per annum for an instrument located in a residence and connected by wire with *our exchange*, the said instrument to be used only by the lessee and his family. Outside of the territory above bounded by the above mentioned blue lines, we charge twenty-five (\$25) dollars per mile or fraction thereof, per annum, extra; except where the location of the instrument is distant from our pole routes, in which case, we make a proportionate increase."

The blue line district mentioned in the schedule is, on the north side all south of North avenue, excepting Goose Island. On the west side, all east of Western avenue, south of West Division street and north of West Twenty-first street and the south branch. On the south side, all of the south division, except the territory west of Clark street and south of Thirty-first street and the forks of the south branch.

All the forms of contracts used recently by the telephone company refer to the company as the "lessor" and the patron as the "subscriber" or "lessee", or both. In the form entitled, "Exchange Line Contract-Business" the lessee is given the use of the company's "Chicago Exchange", and it agrees to move the telephone from place to place "within the limits of the *Chicago Exchange*" and the fixed rentals are referred to as "The Charges for *Chicago Telephone Exchange Service*", and said not to include "Toll line service with distant towns, or toll stations," which shall be based upon the lessor's established tariff. In this form it is provided that the lessee is to be connected by "*a grounded line*" with the Chicago Exchange. In the form called "Special Service Contract" the lessor agrees to furnish "copper metallic circuit" and "long distance equipment." In other respects, this form, which requires payment of one hundred and seventy-five dollars annually, is practically the same as the one first mentioned, as is also the form designated "Residence Party-Line Service—Special Limited Contract for Residence Telephone System." The form described as "Direct Line Message Rate", for a fixed annual payment, allows six hundred "local" messages and prescribes a sliding scale per message for messages

in excess of that number. This form defines "a local message" as one "from said subscriber's station to any other station in the Chicago Exchange System," and "a toll or foreign message" as one "from the subscriber's station to a station or exchange outside of the Chicago Exchange System." The form known as "Exchange Subscription for Nickel Service" calls for a slot machine, and like the form known as "Exchange Subscription" contains most of the provisions of the form of contract first described.

In the "Chicago Telephone Directory, September, 1903," on page ii, under the head of "General Information", the following definitions occur: "A local message is a communication of *five* minutes or less duration, from a subscriber's station to any other station within the Chicago Exchange limits. A toll message is a communication from the subscriber's station to any station outside of the Chicago Exchange limits, but within the area within which the company operates. The duration and rates for toll messages shall be as now or hereafter established by the company. (See page IV.)

On page IV. of the directory appears a four-column list of towns and alleged suburbs, some of which are in the States of Indiana and Wisconsin, but most of which are situated in the State of Illinois, in Cook County, or other counties, while many of them are within the present *limits* of the City of *Chicago*; as, for example, Englewood, Pullman, Rogers Park, South Chicago and Washington Heights. After the name of each town in this list the "toll" or extra rate charged is printed. At the top of the page bearing this list of towns, in large type appear the words "Rates from Chicago to Suburban Toll Points Reached by the Lines of the Chicago Telephone Company," and the rates stated "are for conversations of *three* minutes or less."

It is now proposed to briefly call your attention to several propositions of law upon which the answers to your questions must depend.

The charter of the Chicago Telephone Company from the State merely brought the company into existence without the power to conduct the business, to prosecute which it was created, until the cities in which it proposed to operate had exer-

cised the sovereign power delegated to them by the State in regard to their streets (Hurd's Rev. Stat., 1899, Ch. 134, Sec. 4, and *Dickinson v. Kewanee E. L. & M. Co.*, 53 Ill. App. 379). And the City of Chicago had the right, if the telephone company is a *quasi* public corporation, to attach as a condition to the grant of rights in its streets the performance of duties beneficial to the public. The consent to the use of the city's streets for poles and wires was sufficient consideration for the acceptance of the conditions in the ordinance relating to rates or prices for telephone service. *People v. Suburban R. R. Co.*, 178 Ill. 594; see also *People's Gas Light & C. Co. v. Hale*, 94 Ill. App. 406.

While some of the decisions treat telephone companies as common carriers, others favor a modified view, holding that they are like common carriers in some respects, but they will be found practically a unit upon the proposition that they are *quasi* public corporations, bound to serve all those applying to them impartially on equal terms, and therefore the distinction is unimportant here. *Nebraska Tel. Co. v. State*, 55 Neb. 627; *Central U. Tel. Co. v. Fehring*, 146 Ind. 189; *Cent. U. Tel. Co. v. State*, 118 Ind. 194; *Hockett v. The State*, 105 Ind. 250; *State ex rel. v. Citizens Tel. Co.*, 61 S. C. 83; *State ex rel. v. Kinloch Tel. Co.*, 93 Mo. App. 349, and see *Snell v. Clinton E. L. Co.*, 196 Ill. 626, 630.

The ordinance is neither a mere license, nor a private contract, but partakes of the nature of both, and as regards the rights of the company in the streets of Chicago, it may be said to be the measure of its rights and liabilities.

If, then, the ordinance of the telephone company is the measure of its rights within the corporate limits of Chicago, it is to be construed in favor of the public, and the privilege of charging any tolls, or rates, or prices for telephones or telephone service cannot be implied from its local charter (the ordinance) but must be expressly granted and is limited to the right conferred thereby. The company cannot at one time claim to be doing business in Chicago by virtue of the ordinance, and at another claim to be conducting its affairs in the city under the charter from the State, or under common law rights. As was said in *The Camden & A. R'd. & T. Co.*

v. Briggs, 22 N. J. L. 623, 662—"No right whatever is granted to the company to transform themselves at pleasure from being carriers under the charter to become carriers at common law." See also *Sturgeon Bay Harbor Co. v. Leatham*, 164 Ill. 239.

-These general principles disposed of, the particular questions hereinbefore set out may be taken up in their numerical order.

First. In discussing the first question it is necessary at the outset to give attention to the meaning of the word "tolls." Giving the usual legal significance to the term, the company is authorized by the ordinance to charge "tolls", the general words, "rates", "prices", and "charges" apparently being used as synonymous therewith.

The company, however, has, as has been observed, used the term in its contracts not in its comprehensive and customary sense, but has ascribed to it a narrow and special meaning. Under the company's definition, the word "tolls" applies to the prices charged subscribers connected with one of its exchanges in the City of Chicago called, "the Chicago Exchange" for conversing with patrons served through any other exchange in Chicago or elsewhere in the territory occupied by the company.

Hereafter the word "tolls" as herein used is to be understood in this particular sense.

Turning to the ordinance of January 4, 1889, and bearing in mind that the power to exact "tolls" must be expressly granted, it is my opinion that it contains no warrant for the levying or collection of "tolls."

The title of the ordinance which may be considered with the body of the latter, plainly contemplates one line or connected system, and not a number of separated systems. Clause 3 refers to "a system of poles and wires", and there is nothing in the clause indicating an intention that any of the lines or poles and wires shall be operated by themselves or in any way other than in conjunction with the wires underground and all other wires. The clauses may be interpreted fairly as meaning that the company may build its system all over the streets in Chicago, and that it can build extensions

thereover likewise, and not as meaning that it may erect a separate and distinct system in any street it sees fit, which does violence to the spirit of Clause 9. That part of Clause 6 relating to free wires to the offices of city officials supports the interpretation put forward and aids also in defining the "Chicago Exchange." Clause 7 uses the words "telephone system" which refers to the word "operating." In *Southern Bell T. & T. Co. v. D'Alemberte*, 21 So. 570, the definition of a "telephone line" as given by Webster was approved, that is, "the whole of a system of telegraph wires under one management and name" and it was held to be the sum of all the wires connected with one another. See also *Hockett v. The State*, 105 Ind. 250, and *Ewart v. Village of Western Springs*, 180 Ill. 318.

It was decided in *McClellan v. Westchester Electric Ry. Co.*, 55 N. Y. Supp. 556, that a street railroad company whose articles contemplated a single connected road, carrying from end to end for a *single fare*, cannot construct an independent line, not connected with its original line. See also *Camden & A. R'd. & T. Co. v. Briggs*, 22 N. J. L. 623.

The words, "Chicago Exchange" in the ordinance should be interpreted as signifying one entire exchange, covering all of the city, or as the principal exchange of the company in the city, together with all its local branches, no matter what particular or restricted meaning the company, by contract or rule, may place upon it or what branches or sub-exchanges within the limits they may deem disconnected therefrom. When the words of an ordinance are plain and explicit courts will not go beyond its wording in construing it. *Peoples Gas Light & Coke Company v. Hale*, 94 Ill. App. 406.

But looking outside the terms of the ordinance to the schedule of rates filed, the sole provision found for a charge per message instead of an annual rental is that relating to public telephones which are stated to be the same as business telephone, "with a right to permit the use to the general public and charge therefor ten cents for a local connection."

A cursory examination even of this schedule will convince the mind that the word "*local*" relates and only can relate to the whole City of Chicago and not to some part thereof.

And the use of and manner of using the words "our exchange" by the company in the schedule of rates filed is in harmony with the idea that one system of exchange is intended for the city, there being no suggestion that even telephones outside the blue line district are to be appendages of some other exchange. The schedule makes it plain, then, that any charges the company made or contemplated making, other than those fixed for the "blue line district", were arranged by the company on the basis that only patrons who were at a distance should pay increased rents. But there is nothing even in the schedule of charges disclosing any intention on the part of the company to construct branch systems for patrons outside the "blue line district" and to spread the cost of such extensions over the entire system by establishing "toll" charges. And certainly the ordinance gives the company no such right.

Furthermore, to permit the company to subdivide the city into districts or distinct exchanges and to restrict subscribers to the use of telephones attached to such local exchanges, unless extra compensation is paid the company to communicate beyond the line of the local exchange, allows the company to do by itself precisely what it cannot do in combination with another company under Clause 9 of the ordinance. Moreover, no authority can be found in the ordinance for double or extra charges of any kind, so that if the word "tolls" is not included in the words "prices" or "rates" as used therein, the company has no power to impose these so-called "tolls"; but the ordinance taken in conjunction with the schedule of rates makes it clear that at the date the ordinance was enacted telephone rates were charged in the form of annual rents and the company is confined to the method of fixing rates prescribed by the ordinance.

Bancroft et al. v. Wall et al., 6 Ohio (Dec. 22).

In brief the ordinance looks to the payment by patrons of one annual charge for telephone service, whether called rent, rental, price, toll or charge, although such annual price for purposes of payment may be apportioned by months or other fractions of a year.

If the views expressed are sound, then the company can-

not base any extra charge for telephone service upon the sole ground that a message was forwarded over another line within the city owned by itself and the clause in its contracts requiring extra payment is void. In *Missouri Pacific Ry. Co. v. Kuthman*, 2 Willson Civ. Cas. Ct., App. Sect. 465, it was decided that when *two* alleged lines were in fact *one*, the controlling road was only entitled to charge as upon one line. See also *Camden & A. R'd. & T. Co. v. Briggs*, 22 N. J. L. 623; *Union Traction Co. v. City of Chicago*, 199 Ill. 579.

In *Twells v. Pennsylvania R. Co.*, 3 Am. Law Reg. (U. S.) 728, it was decided that although a carrier has power by special statute to discriminate between *local* and *other* freights, yet it cannot do so upon the ground that certain freight is to be carried to its final destination by *another route after* reaching the terminus of the carrier; nor upon the ground that it is to be carried by a roundabout route. *Burlington & M. R. R. Co. v. Chicago L. Co.*, 15 Neb. 390.

It should be observed in leaving the first question that the company has, in all its forms of contract, exacted these tolls, not upon the ground that the lessee is getting a cheaper rate or some special advantage in consideration of the toll charges, but upon the fact that a message is transmitted to a line outside of the "Chicago Exchange" owned by the same company and operated within the city limits. A regulation adopted for an illegal and unreasonable purpose cannot be supported as a reasonable regulation upon fictitious grounds. *Western U. Tel. Co. v. Gamblee*, 25 So. 232. And it is void upon its face. *Krueger v. Chicago, St. P. M. & O. Ry. Co.*, 71 N. W. 683. *North Packing & P. Co. v. Western U. Tel. Co.*, 70 Ill. App. 275.

Second. The exaction of tolls from lessees of telephones which are situated within the blue line district, if such lessees are paying for the service received, the maximum rates or rents prescribed by the ordinance in connection with the schedule of rates filed, is clearly without warrant of law for the further reason that a telephone company or other public service corporation transacting its business under a statute or ordinance fixing charges, tolls, freight or fares, is bound not to exceed the prescribed compensation. *People v. Subur-*

ban R. R. Co., 178 Ill. 594; *Kissane v. Detroit, Y. & A. A. Ry.* (Mich.) 79 N. W. 1104; *Mahan v. Mich. Tel. Co.*, 93 N. W. 629; *City of Noblesville v. Noblesville Gas, etc., Co.*, 157 Ind. 162; *Muncie N. G. Co. v. City of Muncie* (Ind.), 66 S. E. 436; *State v. City of Spokane*, 63 Pac. 1116; *Southern Bell Tel. Co. v. City of Richmond*, 103 Fed. 31; *Adams v. Union R. Co.*, 42 Atl. 515; *Johnson v. State*, 113 Ind. 143; *Hockett v. The State*, 105 Ind. 250; *Rice v. Detroit Y. & A. A. Ry.*, 81 N. W. 927; *Camden & A. R'd. & T. Co. v. Briggs*, 22 N. J. L. 623.

The contention of the company that the words "now established" in Clause 6 of the ordinance relate to the two preceding words "telephone service" simply instead of five preceding words "the rates for telephone service" demands a construction of language which seems so artificial and strained that I think it may be dismissed with the statement it is without merit in the light of the entire wording of Clause 6, and of the whole ordinance.

It is the duty of a telephone company upon payment of the rates required by ordinance to furnish *complete* service of the kind in which it deals, with such appliances for use and convenience as the state of the art affords from time to time, without extra charge, and it is also the *duty* of the company to keep abreast of the march of improvement. *Gardner v. Providence Tel. Co.*, 49 Atl. 1004; *Hockett v. The State*, 105 Ind. 250; *Cent. Un. Tel. Co. v. Fehring*, 146 Ind. 189; *Central U. Tel. Co. v. Bradbury*, 106 id. 1.

And no cloak, disguise, subterfuge or pretext will enable corporations of this character to evade the rule just stated, and they will not be permitted to extort extra or additional compensation, veiled under the style of tolls, extra service, meter rates, or special charges for equipment. See cases last cited and:

Bancroft et al. v. Wall et al., 6 Ohio (Dec. 22).

Louisville Gas Co. v. Delaney, 38 S. W. 703.

Cent. Union Tel. Co. v. State, 118 Ind. 194; 123 id. 113.

Zagelmeyer v. Cincinnati S. & M. R. Co., 102 Mich. 214.

Mo. Pac. Ry. Co. v. Kuthman, *supra*.

Camden & A. R'd. & T. Co. v. Briggs, 22 N. J. L. 623.

Horton v. Erie R'd. Co., 65 App. Div. 587.

Of course what has been said as to the illegality of toll charges because the prescribed maximum rates are exceeded, does not apply to tolls charged to subscribers whose rentals taken with the tolls do not amount to more than the limit of rates allowed by the ordinance; but it has already been shown that the ordinance contemplates a single rent and a single system.

The consequence of rejecting the construction that a single system was intended, is that a subscriber paying the maximum rate would not be subject to toll for telephoning to Rogers Park for example, but if the subscriber in Rogers Park who was wanted, was absent, he would, upon his return, be compelled, if he was not paying maximum rates, to pay toll if he desired to communicate with the first subscriber or wait until the latter called him again. In many cases the course pursued would depend upon whether or not the Rogers Park subscriber expected to be reimbursed for his outlay for toll with the result that the subscriber who is paying full rates is either subjected to delays and the annoyance of repeated calls, or sustains an additional expense for toll. It is difficult to conceive of the legislative body of a large and growing city, intentionally framing an ordinance that would so work to the inconvenience of the public. As was said in *Hockett v. The State*, 105 Ind. 250, the leading case on the subject, speaking of the telephone: "It has become as much a matter of public convenience and of public necessity as were the stage coach and sailing vessel a hundred years ago. No other known device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an indispensable instrument of commerce." The use of the telephone is a double one, and the opportunity of receiving messages is or may be of as much value to the subscriber as the opportunity of sending them. It is at least of very considerable value, and there is no limitation or burden thrust upon one subscriber that may not affect, sooner or later, a large number of the other subscribers connected with the same exchange, and it is for this reason, doubtless, that the City Council legislated with a view to a single system.

It may be suggested that the company may abolish tolls and yet can and will obviate the necessity of a real reduction in its prices to subscribers who pay less than the maximum rates, by raising their rents or rentals. The natural answer is that this question is not here involved, and further that the city or a subscriber himself may attack the company's rates as unreasonable.

This is not the occasion for pointing out the susceptibility of the rates of the Chicago Telephone Company to such an attack.

Third. I entertain no doubt of the validity of an ordinance abolishing toll charges within the city limits, or in any other manner reasonably reducing the rates for telephone service now demanded by the Chicago Telephone Company, in view of the rights reserved to the city by the ordinance of January, 1889. *Nebraska Tel. Co. v. Cornell*, 82 N. W. 1.

Fourth. Any ordinance diminishing or altering telephone rates, which the company is *authorized* to charge by, or which are established by, the ordinance of 1889, would, in my opinion, under the proviso in the ordinance, extinguish the right of the city to *future* participation in the profits of the company's Chicago business. It would therefore entail a heavy financial sacrifice, but as alternative remedies, which would accomplish the purpose designed by the passing of an ordinance abolishing tolls, I would suggest:

First. That the City Council may enact an ordinance prohibiting the telephone company from charging in excess of the rates or prices authorized or fixed *by the ordinance* of 1889, and providing penalties for violations of such new ordinance. Under such an ordinance the continued collections of tolls could be checked; if, as has been insisted herein, the levying of tolls is in contravention of the ordinance of 1889. And an ordinance framed along these lines would not violate the contract with the company (the ordinance of 1889). *Camden & A. R'd. & T. Co. v. Briggs*, 22 N. J. L. 623; *People v. Detroit Citizens St. R. Co.*, 116 Mich. 132. Nor would the passage of such an ordinance constitute a regulation or alteration of rates or prices. The telephone company might, nevertheless, claim that the adoption of such a new ordinance consti-

tuted a legislative impairment of contract obligations and invoke the jurisdiction of the Federal Court, and it would seem advisable to avoid this probability if other remedies will suffice.

Second. Compliance with the conditions of the ordinance may also be enforced by mandamus by the State acting directly or through the municipality. *People v. Suburban R. R. Co.*, 178 Ill. 594; *Mahan v. Michigan Tel. Co.*, 93 N. W. 629.

Third. The city may file a bill to enjoin the telephone company from violating the conditions of the ordinance of 1889 as to prices for telephone service on behalf of the inhabitants of the city, upon the ground that it is trustee for the public under the ordinance, and as a matter of public expediency, because such a bill would obviate a multiplicity of suits by individual patrons of the telephone company. *Muncie Natural Gas Co. v. City of Muncie*, (Ind.), 1903, 66 N. E. 436.

The case just cited, although affording a new relief for the patrons of public service corporations, is decided upon principles that are not new, and are in consonance with the rulings of our Supreme Court.

In summing up, the replies to your question may be briefly stated as follows:

1. Every subscriber of the Chicago Telephone Company whose telephone is located within the present corporate limits of the City of Chicago and who is paying for the kind of telephone service received, the maximum price stipulated in the schedule filed under the ordinance of January 4, 1889, is entitled to telephonic connection with the wire of any other patron of the company whose telephone is situated within the city limits, without the additional payment of any so-called "toll charge." He is also entitled to all the facilities, equipment and improvements that go to make complete service without extra charge or special payments, the right of the company to impose rents or rates for telephone service being limited by the ordinance.

2. The ordinance referred to contemplates a single telephone line or system within the City of Chicago, and the Chicago Telephone Company therefore has no power to construct

or operate a number of separate systems. These so-called "toll charges" mentioned in all the company's contracts are invalid, being framed upon the theory that the company has the right to operate and is operating a number of distinct local exchanges or lines and that a subscriber connected with one exchange or line can be burdened with an extra charge for conversing with a subscriber whose wire is attached to another exchange or line. It results then that no subscriber of the company, regardless of the class of service contracted for, is liable for the payment of "toll charges" for Chicago or local telephone service. Any one of the various rates fixed by the company for different grades of service when paid by the patron authorizes him to demand free of "toll", communication with any other subscriber within the city limits as they exist at the time of making his demand.

3. Conceding, for the purpose of this opinion only, that the company could not be forced to extend new lines of wire into remote parts of the city for the convenience of a few inhabitants of the city, yet when it has so extended its lines they become a part of this single system.

4. No legislation is necessary to prevent the company charging "tolls", but the city can prevent the continued imposition of tolls by itself filing a bill for injunction.

5. Subscribers who in the past have paid these "tolls" may by suit recover the amount so paid.

Pingree v. Mutual Gas. Co., 107 Mich. 156.

Respectfully submitted,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 28, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Replying to your letter of November 14, 1903, with reference to the deposit for use of street at the northeast corner of Division street and Dearborn avenue, I beg leave to say

that my understanding is that the contractor in charge of the work at that place has made excavations extending to the curb line, and that this state of affairs has continued since the deposit was made, namely, on June 27, 1903.

The deposit, as I understand it, is made for the use of the street at that place for the purpose of storing building material and covers such use for a period of one year from the date of the deposit. The contractor is also required by the rules of your department, as I understand it, to keep the sidewalk open and free from obstruction.

Inasmuch as it is the duty of the contractor himself to build the temporary sidewalk at the place in question, and inasmuch as nearly half of the money deposited has already become the property of the city as compensation for the use of the street, and inasmuch as it appears that the contractor has abandoned the work, or at least suspended operations for the time being, I think you would be justified in using so much of said money as may be necessary to build the temporary sidewalk and to put the street in passable condition.

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 28, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have before me your letter of November 9, 1903, in which you request this department to give you an opinion as to the legality of reservations of two strips of land for switch track purposes in Silverman's Addition to Irving Park, Montrose and Jefferson.

Replying thereto I beg leave to say that a subdivider undoubtedly has the right to reserve a portion of a subdivision for any purpose that may seem proper to himself. There is, however, a different question involved in this matter.

It appears from the tracing furnished by the bureau of

maps, and from the letters of the superintendent of said bureau, that one of the strips in question, namely, the one north of the Chicago & Northwestern Railroad track, is being used as a public street and has been so used by the public continuously ever since the strip was laid out, some thirty years ago; that sidewalks have been built thereon, showing an intention on the part of the public to accept and use the said strip as a public street and all this, it must be presumed, with the knowledge of, and without objection from the owner of the subdivision.

Assuming these facts to be true, the strip in question has become a public street by prescription and no switch track can be laid therein except by permission from the City Council.

As to the strip south of the Chicago & Northwestern Railway right of way, it does not appear that said strip has ever been used as a street or highway, or that any improvements have been made therein by the city. The city, consequently, has no interest in the matter and in my opinion there is no objection to your giving Mr. Silverman a writing to that effect

Tracing, abstract and correspondence herewith returned.

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

NOVEMBER 30, 1903.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

I have the following letter from you, under date of the 21st inst.:

“Chicago, Nov. 21, 1903.

“Hon. Edgar B. Tolman, Corporation Counsel.

“Dear Sir—

“Section 153 of the building ordinance says for all other buildings of Class 2 there will be required for each building at least two flights of stairs.

"This section means and refers to flat buildings. The information I want is, can we make people who own these buildings, built before this ordinance was passed, with only one flight of stairs put in another flight. Was it the intention to make the ordinance apply to new buildings only, or take in all of them, whether built previous to the passage of the ordinance or not?"

"Respectfully yours,

"George Williams,

"Commissioner of Buildings."

Section 153 is as follows:

"Sec. 153. For all other buildings of Class II, there will be required for each building at least two flights of stairs, which, for buildings of 2,000 square feet or less in ground area, shall be at least three feet wide each, with an increase of six inches in width for each addition of 500 square feet to the ground area of the building, up to a ground area of 3,000 square feet, and after that there shall be an additional flight of stairs not less than three feet wide for each additional 2,000 square feet of floor area or fractional part thereof. In all cases where buildings of Class II are built entirely of fireproof construction, the number of stairs herein provided may be reduced by one flight from the number herein specified for non-fireproof buildings."

The latter portion of this section provides that in cases where buildings of Class II are built entirely of fireproof construction, the number of stairs therein provided may be reduced by one flight from the number therein specified for non-fireproof buildings.

Section 160 of the Building Ordinance is as follows:

"Sec. 160. Excepting in cases where the immediate safety of the occupants of buildings is concerned, nothing in this ordinance shall be considered as requiring alteration in the construction or equipment of buildings existing at the time of the passage of this ordinance, and, at that time, complying with the ordinance then in force. If, however, it is desired to enlarge, or in any manner materially modify the construction of any existing building, or to make change in its use or occupation, which will transfer it from one class,

as recognized by this ordinance, to another, then before such enlargement or structural change or modification of building is made, or before such change in its use or occupation may be made, the entire building shall be reconstructed or modified in such manner as to bring the same, when enlarged or altered, or when occupied for its new and different purposes, in accordance with the provisions of this ordinance."

In cases where the building was constructed prior to the passage of said Section 153, and at that time complied with the ordinance then in force, unless the immediate safety of the occupants of said building is concerned, you cannot require alterations to be made in such buildings and the construction of additional stairs. It is for you to determine whether or not "the immediate safety" of the occupants of the building is concerned.

Very truly yours,

WM. H. SEXTON,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 4, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At the last meeting of your honorable body the following order was passed:

"ORDERED, That the Corporation Counsel be and he is hereby directed to give an opinion as to whether, without action of the council, a subdivided street can be lawfully vacated by withdrawal of dedication, where the city has never accepted the offer to dedicate by asserting its rights therein or in some way improving the same."

Complying therewith I have to say that, aside from streets which have been acquired by fifteen years' user or by condemnation proceedings, two things are requisite to constitute a public street, alley or highway: (1) a dedication or donation by the owner of the land; (2) an acceptance or taking by the

municipal authorities. The dedication may be one of two kinds: a statutory dedication or a common law dedication. In the former, the property owner makes and acknowledges a plat in conformity with the statute and places the same on record, and the certificate attached to the plat will generally show whether or not the same conforms to the statute and thereby becomes what is called statutory dedication. A common law dedication is where for some reason or other the requirements of the statute as to the filing of a plat have not been complied with or the plat itself is defective, or where the owner by some affirmative act shows an intention to dedicate: as, for example, where he sells lots abutting on a street shown by an unrecorded plat, or where he builds sidewalks or erects fences on the line of a street.

When a street or alley has been dedicated by the owner, either in conformity to the statute or by some other method which evidences an intention to dedicate, it is further necessary to complete the dedication that it should be accepted by the city authorities in order to constitute a public street or alley of the city.

City of Chicago v. Drexel, 141 Ill. 89.

Little v. City of Lincoln, 106 Ill. 368, and cases cited.

The virtue of this rule of law is almost self-evident. The municipality is responsible for its streets and is bound to keep them in good condition. If the mere dedication were sufficient to constitute a public street, a burden and responsibility would be thrown upon the municipality which it might not care to assume and ought not to assume.

Until the street has been accepted by the city, the owner may at any time, so far as the municipality is concerned, withdraw his dedication and vacate the street.

Little v. City of Lincoln, 106 Ill. 353.

Viulage of Winnetka v. Prouty, 107 Ill. 218.

A lot owner, however, who has bought with reference to the proposed street, may prevent the vacation or withdrawal of the dedication if the access to his property is cut off by the vacation of the street.

Chicago v. Union Building Association, 102 Ill. 379.

Little v. City of Lincoln, *supra*.

Even where a street has been both dedicated and accepted, it may be abandoned by the public and the municipality so as to preclude its further use as a street.

Peoria v. Johnson, 56 Ill. 51.

Village of Winnetka v. Prouty, *supra*.

The acceptance of a dedication may be shown in a great variety of ways. The more usual are ditching, grading, repairing, curbing, paving, laying sidewalks, sewers, drains, or water pipes, or the erection of lamp posts, or the exercise of like jurisdiction through order of the City Council or by duly authorized municipal officers, there being practically no limit to the evidence which will prove an acceptance by the city; the best evidence being, however, the exercise by the City Council of its charter power over streets of the city.

The approval of a plat by the Superintendent of Special Assessments is not an acceptance by the city of the streets and alleys shown thereon. Section 5 of Article X of the Cities and Villages Act authorizes the City Council to provide that all proposed subdivisions shall, before being recorded, be submitted to some officer of the city for approval, and under this power the City Council has made the Superintendent of Special Assessments ex-officio examiner of subdivisions, and he is required to certify his approval of plats.

Revised Code of 1897, Section 1653.

It is obvious that the object of these enactments is to secure uniformity of street lines in subdivisions, and the mere approval of a plat by a city official does not impose upon the municipality the duty and responsibility of improving and maintaining streets and alleys in such subdivision; and such streets do not become, by the mere approval of the plat by such city officer, public streets.

Littler v. City of Lincoln, 106 Ill. 368.

If the city has not accepted the dedication or donation by the owner of land in some of the methods above indicated, and if the street or alley has not been laid out as a highway, the owner can, without action by the city or its officials, vacate the dedication under authority of Sections 6, 7 and 8 of Chapter 109 of the Revised Statutes of Illinois, which are as follows:

"Sec. 6. Any such plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument declaring the same to be vacated, executed, acknowledged or proved, and recorded in like manner as deeds of land; which declaration being duly recorded, shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such writing.

"Sec. 7. Any part of a plat may be vacated in the manner provided in the preceding section, and subject to the conditions therein prescribed: *Provided*, such vacation shall not abridge or destroy any of the rights or privileges of other proprietors in such plat: *And, provided, further*, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law.

"Sec. 8. When any plat or part thereof is vacated, the recorder in whose office the plat is recorded shall, upon the recording of such vacation, write in plain letters across the plat or part so vacated the word 'vacated', and shall also make a reference on the same to the volume and page in which the instrument of vacation is recorded."

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 5, 1903.

WM. E. DEVER, Esq., of Council Investigating Committee on Paving, etc.

Dear Sir:

Yours of the 2d inst., written at the request of the Council Investigating Committee on Paving, etc., inquiring "whether the city has the legal power to enter into the busi-

ness of re-adjusting and building catch-basins in connection with street paving," duly received.

The seventh clause of Section 1 of Article V of the Cities and Villages Act gives express power to the city to "pave or otherwise improve streets." There can therefore be no question as to the "legal power" of the city to re-adjust and build catch-basins in connection with street paving. The real question is one of ways and means, and not of charter power.

If an appropriation were duly made, so that a fund were available for such construction, it could be done by the city and paid out of the moneys so appropriated. This expense would then, of course, be eliminated from the special assessment proceeding.

If, on the other hand, it is desirable for financial reasons that the cost of such construction should be borne by the property owners whose property is benefited by the improvement of the street, the work in question, like the rest of the improvement, must be advertised and let to the lowest responsible bidder. Some years ago the city followed the plan of including the adjustment and construction of catch-basins in the special assessment ordinance, and awarded the contract for the whole improvement, including both paving and the adjustment of catch-basins, to the lowest and best bidder, but inserted a clause in the contract requiring the person to whom the contract was awarded, to deposit a fixed sum of money with the city sewer department, to be used in the construction and adjustment of catch-basins. The work was then constructed by said department for the contractor and vouchers given him for the entire amount of the work, including the amount for the construction of catch-basins done by the city for the contractor with the contractor's money. The point was soon raised, however, that this method contravened the requirements of the statute for competitive bidding, and that it amounted to the making of a fixed price for the portion of the work thus done by the city for the contractor and eliminated competition therefrom. There was no decision on this point rendered by the Supreme Court, but I am informed that the County Court sustained objections on the ground

stated, and the method then in use was abandoned, and the paving contractor either did the work himself or sub-let the catch-basins to contractors in that line of business. I am informed that under the present practice the result is much less favorable to the property owner than under the practice above referred to which has been abandoned; that while the doing of the work at a fixed price was a *theoretical* elimination of competition, leaving it in the hands of contractors has resulted in a monopoly of that kind of business and thus *practically* produced an elimination of competition.

I believe that a method can be lawfully adopted by which the theoretical objection above referred to can be obviated and an additional element of competition secured. Let the ordinances provide, as at present, that the entire work shall be done by special assessment. Include in the statutory estimate of costs, items for the construction and adjustment of catch-basins, fairly estimated at what it would cost the city sewer department to do the work. Notify all bidders that the city stands ready to take from the successful bidder a sub-contract for the construction and adjustment of catch-basins, at the price fixed in the estimate. Do not make it compulsory on the successful bidder to sub-let the work to the city, but leave him to be guided by self-interest. If he can do the work cheaper himself, or can secure a bid from a sub-contractor to do it cheaper, leave him free to pursue that course. If he cannot do it or sub-let it at a lower price than the city stands ready to do it for, self-interest will cause him to accept the city's offer. The result may be that the city does the work or that the firms now holding a virtual monopoly of this kind of business will meet the city's price. In either event, no provision of the special assessment statute is disregarded and the property owner obtains the benefit of the reduced cost of construction.

Very respectfully yours,

EDGAR B. TOLMAN,

Corporation Counsel.

DECEMBER 5, 1903.

, MR. L. E. GOSSELIN, Auditor.

Dear Sir:

Your letter of November 13th, with enclosures, in regard to the compensation to be paid to the city by the Morrison Hotel and Restaurant Company, under the ordinance passed on December 16, 1901, page 1618, Council Proceedings, has been referred to me for reply.

The compensation provision is found in Section 3 of the ordinance, and is as follows:

"The rights and privileges herein granted are granted upon the express condition that the grantee herein shall, from the date of the acceptance of this ordinance, pay to the City of Chicago a sum equal to ten (10) per cent of its gross receipts derived from the sale of electrical current for lighting, heating and power purposes within the the territory covered by this ordinance; . . . the grantee herein shall deliver to the City Comptroller with each payment a duly verified statement in writing setting forth accurately the amount of revenue derived by it from the sale of electricity within the territory described herein. The City Comptroller shall have the right at any time within sixty (60) days after the filing of such statement to examine the books, accounts, contracts and papers of said grantee, for the purpose of ascertaining the accuracy of such statement."

From the diagram attached to your letter it appears that this company, under said ordinance, supplies light to two of its tenants in the same building, Notara Bros. and the Owensboro Club. The facts submitted to this department do not indicate whether these sub-tenants pay a specific sum for electricity in addition to rent, or whether they pay rent for the premises with electrical current supplied. Even in the latter case, it is but fair to presume that in the contract of lease between the company and its tenants, who conduct an independent business in the building, the rent is made up in part of a charge for electric light service. Clearly, that is revenue "derived from the sale of electrical current." There is nothing in said ordinance limiting the payment of compensation to

revenue derived from the sale of electrical current in other buildings than those occupied by said Morrison Company.

Therefore, I am of the opinion that such receipts come within the provisions of the ordinance, and the city is entitled to its proportion thereof.

The provisions of said ordinance empower the city to inspect books, papers, etc. (which includes leases) for the purpose of obtaining the information necessary to ascertain the amount of revenue on which compensation is to be paid.

Very respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 5, 1903.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Your favor of December 1st received, in which you request an opinion for the guidance of the board as to the manner in which the proposed assessment proceedings for a sewer in West Irving Park boulevard, from Milwaukee avenue to North 66th avenue should be carried on, it being understood that the county board has agreed to pay a certain portion of the cost thereof, in consideration of the sewer draining the county property which is outside of the city limits. Accompanying your request for an opinion was a memorandum of the scheme for the proposed sewer in West Irving Park boulevard submitted by Engineer Hill.

From your letter and this document I understand the proposition to be, to construct a large trunk sewer in the south side of Irving Park boulevard, from North 48th avenue to North 66th avenue; that the property on both sides of Irving Park boulevard from North 48th avenue to North 60th avenue is within the city limits; west of North 60th avenue the property on the south side of the street is within the city limits and the property on the north side is without the city limits; that the property on the north side of the street west

of North 64th avenue belongs to the county and is used for the "Poor Farm", and contains a number of buildings inhabited by three thousand people; that there is a decided slope eastward from North 66th avenue to the river, a distance of four and one-half miles; that all the surface water from the "Poor Farm" naturally flows east into the city. That there is at present a large sewer in Irving Park boulevard extending east to the river; that this sewer will be the outlet of the proposed sewer; that there is now a tile sewer in the north side of the street extending from the west end of the existing sewer to the "Poor Farm"; that one and one-half miles of this sewer is within the city and one-half mile without the city; that this sewer is in very bad condition and is a public nuisance. That the proposed sewer is designed to drain the adjacent lands within the city and about one hundred acres outside; that the cost is estimated at \$66,000; of this amount the county offers to pay \$14,000 for the privilege of draining the "Poor Farm." This would make the portion to be assessed on the city property less than the cost of a smaller sewer just sufficient for the lands within the city.

From your letter and information furnished by Engineer Hill and from statements made at the recent meeting of the Board of Local Improvements, which was held for the purpose of conferring with the committee of the Board of County Commissioners to consider this proposed improvement, I infer that the plan proposed, upon the legality of which you wish an opinion, is to construct said improvement by special assessment under the local improvement act; that it is proposed to provide that said sewer shall drain property outside of the city limits, to-wit, the property of the county institutions, for which privilege the property of the county is to be assessed \$14,000.

Upon this statement of facts, I beg leave to submit the following opinion:

Although the statute does not, in terms, provide that an improvement ordinance for the construction of a sewer, the cost of which is to be met by special assessment, shall describe the sewer district or the district which shall have the right to drain into said sewer, nevertheless, under the decis-

ions of the Supreme Court it is necessary for the ordinance to specify such district.

Edwards v. City of Chicago, 140 Ill. 440.

Title Guarantee and Trust Company v. City of Chicago, 162 Ill. 505.

Gray v. Town of Cicero, 177 Ill. 459.

Mason v. City of Chicago, 178 Ill. 499.

Bickerdike v. City of Chicago, 185 Ill. 280.

Therefore, in order to assess the property of the county which is situated outside of the city limits, it would be necessary to include said property in the sewer district described in said ordinance; it would then appear on the face of the ordinance that the sewer district included territory outside of the city limits. The ordinance under such conditions, in my opinion, would be invalid on its face. A municipal corporation cannot exercise its governmental functions beyond its territorial limits.

Cochran v. Village of Park Ridge, 138 Ill. 295.

Maywood Company v. Village of Maywood, 140 Ill. 216.

An ordinance for a local improvement to be paid for by special assessment is not valid which does not describe the improvement contemplated, and, if in that description it shows an attempt to do that which it is not authorized to do, the ordinance is invalid on its face.

Maywood Company v. Village of Maywood, *supra*.

Section 39 of the Local Improvement Act provides that the commissioner appointed to make the assessment for the construction of a sewer shall investigate and report the district which will be benefited by such proposed sewer, describing the same by boundaries; therefore, the assessment roll would be invalid upon the face thereof, as it would contain property outside of the territorial limits of the city. Special assessment proceedings rest entirely upon the statutory provisions, and these must be strictly construed. There is no provision whatever in the special assessment act which would authorize an arrangement between the City of Chicago and any political subdivision of the State, whereby said subdivision could use a sewer in connection with the city as contemplated. There is a distinction between this case and one in

which as a necessary incident for the completion of an improvement, a drainage without the city limits would be permitted into a contemplated sewer, or in a case where it is necessary to extend a sewer beyond the limits of the city to find a proper outlet. These cases, as I have stated, rest on the ground that such rights are necessary incidents to the proper execution of the contemplated improvement.

However, I beg leave to suggest that the object which you desire to accomplish could be effected in the following manner: In drafting your ordinance for the proposed improvement confine the description of your sewer district to that property which is within the city limits; furthermore, do not let any reference to this territory outside of the city limits appear in any of the records of the Board of Local Improvements, or the ordinance or the assessment roll. However, direct your engineer to plan an improvement of sufficient size to take care of the drainage of the property which you desire to drain outside of the city limits, and let this increased cost be assessed as public benefits against the City of Chicago; then, if the county board by resolution desires to appropriate an amount equal to the amount assessed against the city as public benefits it can do so. If objection is made in the trial court to the making of this sewer of such a size as to drain territory outside of the city limits, it can be shown according to the statement of Engineer Hill that the lands of the county which it is proposed to drain are dominant lands, and that the drainage from this land naturally flows and does flow down upon the servient land, to-wit, the territory within the city limits, wherein it is proposed to construct this sewer. If that fact be true, it is proper and legal for the municipality to construct its sewer of such a dimension as to take care of the drainage from the dominant lands which empty upon the servient lands, although these dominant lands may be without the territory of the city.

A somewhat similar question was raised in the Addison avenue sewer case. It was shown that the sewer was designed to drain seven hundred acres west of the proposed sewer district at a cost largely in excess of the cost of constructing a sewer sufficient only to drain the territory within the sewer

district described. This seven hundred acres was neither in the sewer district nor was it assessed for said improvement. An objection was accordingly made in the County Court that it was proposed to drain a territory outside of the sewer district and not assessed. The city showed that the natural flow of the drainage from this seven hundred-acre tract was towards and upon the territory within the sewer district; and upon the theory that the seven hundred acres was dominant land and the territory within the sewer district was servient land, it would therefore be necessary to construct the sewer of sufficient size to take care of the drainage from the seven hundred-acre tract of land. The Supreme Court sustained the contention of the city in *Bickerdike v. City of Chicago*, 185 Ill. 280, and *Gage v. City of Chicago*, 195 Ill. 490.

It is, therefore, my opinion that if the property outside of the city limits which it is the desire of the board shall drain into the proposed sewer is so situated that the drainage naturally flows down upon the lower land within the city limits, it would be proper for the municipality to provide for a sewer of sufficient size to take care of that drainage.

Furthermore, it would be proper for the city to accept from the county a sufficient sum of money to pay said public benefits.

Very respectfully,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 5, 1903.

CHARLES WERNO, Esq., Chairman Judiciary Committee of the City Council.

Dear Sir:

In compliance with the request of your committee as set forth in a communication to the Corporation Counsel, bearing date of the 13th ult., I beg leave to submit my conclusions as to the power of the City Council to compel the Chicago Tele-

phone Company to enclose its public telephones in booths or closets and to return the money deposited in the slot of such a telephone whenever it is impossible for the telephone user who has made the deposit to communicate with the person he has called.

There is no provision in the ordinance of January 4, 1889, granting the Chicago Telephone Company permission to use the streets of the City of Chicago which reserves to the municipality the express power to require the company to surround its public telephones with booths, boxes or enclosures of any sort. The right of the city to exercise this power by ordinance rests upon its police powers and therefore an ordinance imposing the regulations suggested should be general in its operation, affecting all alike who are similarly situated and bear the same relation to the city and its inhabitants. The ordinance suggested by the resolution passed by the City Council would not meet these requirements, being confined in its operation to the telephones of one company, the Chicago Telephone Company. Such an ordinance should apply expressly to all telephone companies supplying service to the public by the means of public telephones.

I am of the opinion that the adoption and enforcement of a general ordinance by the city, imposing upon all telephone companies the duty of surrounding public telephones with rooms or closets, etc., is a valid exercise of the city's police powers, for the reasons following:

The State has delegated to the City Council the power "to regulate the police of the city . . . and pass and enforce all necessary police ordinances;" (Chap. 24, Art. V, Sec. 62, Clause 66, Hurd's Rev. Stat., 1901) which is to be interpreted as meaning ordinances *necessary* for the comfort, safety, health, convenience, good order and welfare of the inhabitants of the city, the word "necessary" being understood not in the sense of indispensable, but in the sense of "conducive", "beneficial", or "effective in the promotion of" the objects mentioned in the statute. *Wice v. C. & N. W. Ry. Co.*, 193 Ill. 351; and see *Culver v. City of Streator*, 130 id. 238.

The power of the city to provide for the public comfort or convenience stands precisely upon the same ground as its

power to protect the public health, the public safety or public morals. *Lake Shore & M. S. Ry. v. Ohio*, 173 U. S. 285, 291; *Escanaba Co. v. Chicago*, 107 id. 678; *Wisconsin M. & P. Rd. v. Jacobsen*, 179 U. S. 287; *In re Wilshire*, 103 Fed. 620, and *Mich. Tel. Co. v. City*, 93 Fed. 11; and see *State v. Canal & C. R. Co.* (La.) 24 So. 265, and *City of Chicago v. Union Traction Co.*, 119 Ill. 259, 264.

The ordinance of January 4, 1889 can have no bearing on the present question of police power because a city cannot by any contractual terms of an ordinance granting a franchise deprive itself of the power of enacting ordinances to carry out the police powers granted by the section of the statute above quoted. *City of Chicago v. Union Traction Co.*, 199 Ill. 259, 264, and *State v. Canal & C. R. Co.*, 24 So. 265.

The rule last stated of course applies to telephone companies as well as to other persons and corporations, and legislation of this character, regulating the poles and wires, for instance, of a telephone company, does not impair the obligation of the contract contained in the ordinance granting the franchise. *Mich. Tel. Co. v. City of Charlotte*, 93 Fed. 11.

It should be kept in mind also that when a corporation is conducting its business in the streets of a municipality and its business and property are impressed with a public interest, it may be subjected to regulations wider in scope in the interests of the public than those adopted by a city for the control of corporations exercising their franchises on their own property. *City of Chicago v. Union Traction Co.*, 199 Ill. 259.

I see no difficulty in the application of the rules stated to an ordinance of the nature proposed, since the telephones that would be affected are public telephones, usually installed in public buildings, hotels, saloons, drug stores, etc., upon business streets, where the use of the telephone if not enclosed is likely to be interrupted by the noises from the street without, and those incident to the transaction of business within. Without attempting any further statement of facts, I think it sufficient to say that a requirement that public telephones be enclosed so as to afford privacy and freedom from

the annoyance of distracting noises is not an arbitrary, but a reasonable exercise of the city's police power.

I find no difficulty as regards the constitutionality of the legislation in the fact that the proposed ordinance relates to public telephones used for communication with telephones or persons located outside the city limits or limits of the State, *as well as* to public telephones devoted solely to local use. Nor is the case different if the ordinance would relate to some public telephones used exclusively for interstate communication. A telephone company is subject to all or many of the obligations of a common carrier. One of these is the duty to accommodate the public impartially. A State, or its delegate the city, has ample power to enforce such obligations against carriers doing an interstate business in the absence of legislation by Congress. Such State legislation is not an interference with interstate commerce if it is not designed to regulate it, but only affects it incidentally, or in common with other business. *Lake Shore & M. S. Ry. v. Ohio*, 173 U. S. 285; *Michigan Tel. Co. v. City of Charlotte*, 93 Fed. 11; and *Wis. N. & R. Rd. Co. v. Jacobsen*, 179 U. S. 287; *Same v. Same*, 71 Minn. 519.

The right of the city to compel the telephone company to charge patrons of public telephones only when they actually communicate with the desired parties doubtless exists under the reserved power in the ordinance of January, 1889, to regulate rates, but in the former opinion to your committee just mentioned, it was pointed out that any legislation which might be construed as a regulation of rates should be considered with reference to the possible loss to the city of future compensation from the telephone company. Legislation on this subject of rates in the present circumstances, would seem unwise, and I think that the proposed rule as to payment by patrons only when actual conversation with another party is had should not now be embodied in any ordinance.

In closing it should be remarked that nothing herein should be taken as holding that the Chicago Telephone Company has the right to maintain its public telephones upon any

scale or measure of charges other than those permitted by the ordinance of January, 1889.

Respectfully submitted,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 9, 1903.

MR. JOHN ERICSON, Chairman, Committee on Streets, of the Board of Local Improvements.

Dear Sir:

In answer to your communication, in which you submit to us draft in part of a new ordinance, so far as it pertains to street work, and ask us to compare the same with the old ordinance, and to furnish you with an opinion as to the legality of the new form, I beg leave to say, as I understand it, your query is whether the following language is so indefinite as to make the ordinance invalid: "Seven parts of the best quality of broken limestone, or other stone, which shall be equal in quality for concrete purposes."

In the case of *Fishburn v. City of Chicago*, 171 Ill. 339, an objection was made to an improvement ordinance that used the following language:

"The cementing material shall be a paving cement prepared from refined Trinidad asphaltum obtained from Pitch Lake, in the island of Trinidad."

The court said, speaking by Mr. Justice Boggs, on page 343:

"If it be the judgment of the City Council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed."

The purpose of this change in the ordinance is not to

limit competition or create a monopoly, but for the purpose of stimulating competition and thereby lowering the cost of the improvement. It is my opinion, therefore, that the proposed change is legal. It might be suggested that the language could be made more specific by making the same read as follows:

“Seven parts of the best quality of broken limestone or other stone which shall be equal thereto in quality for the purpose of making concrete for the foundation for street improvements.”

Very respectfully yours,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 10, 1903.

CHARLES ALLING, Esq., Chairman of Sub-committee of the
Judiciary Committee.

Dear Sir:

I have your communication of recent date requesting the opinion of this department with reference to several matters arising under the revision of ordinances concerning rendering districts in this city. I will address myself to the consideration of these questions in the order in which they are stated in your communication.

First. (a) Does Section 1181 of the new code, which corresponds to Section 1052 of the code of 1897 in some respects, create a legal and valid rendering district?

(b) If Section 1181 of the new code does not create a legal and valid rendering district, does any legal rendering district now exist in the city?

(a) Section 1181 above referred to declares it to be unlawful for any person, firm or corporation to carry on the business of slaughtering of animals, etc., at any place or in any establishment where such business was not carried on prior to April 8, 1897, within the City of Chicago or within

one mile of the limits of said city unless the same be done in certain specified districts.

This section appears to me to be void for the reason that it prevents one citizen from engaging in a particular kind of business in a certain locality under a penalty, while another is permitted to engage in the same business in the same locality. The provision in the section discriminating between establishments already located there and others which might be located in the same district after April 8, 1897, is unreasonable and therefore void, and also has a direct tendency to create a monopoly which the law will not tolerate. A provision in a section of an ordinance very similar to the one in question has been judicially determined to be void in the case of *Tugman v. The City of Chicago*, 78 Ill., p. 405. It is there said:

“Where the power is conferred upon the legislative department of a municipal corporation to enact by-laws and ordinances for the better government of the inhabitants of the municipality, the body entrusted with that power in its exercise cannot enact ordinances that are unreasonable, oppressive or such as will create a monopoly. . . . An ordinance, therefore, which would make an act done by one penal, and impose no penalty for the same act done, under like circumstances, by another, could not be sanctioned or sustained because it would be unjust and unreasonable. Dillon on Municipal Corporations, Section 256.”

The section under consideration also contains provisions for certain districts in which slaughtering may be done, which provisions, I am also of the opinion, invalidate this section of the ordinance. It is made lawful to carry on the business of slaughtering in a district in the city bounded on the north by Snow street, on the east by Elston avenue, on the west by the Chicago & Northwestern Railroad Company's tracks and on the south by Fullerton avenue. And also in a district consisting of lot 1 in the Assessor's Division, part of south quarter southwest of North Branch of the Chicago River, lot 1 and lot 12, section 30, township 40, north range 14, and also in a district lying south of the South Branch of the South Branch of the Chicago River between South Center avenue and Ashland avenue.

All of the above mentioned districts are small in area, and can at best contain but one, or a few, slaughtering establishments. The council had the right, under the powers conferred by the Cities and Villages Act, to so regulate the business of slaughtering animals as to prohibit its exercise except in a particular portion of the city, leaving all persons free to erect slaughtering houses and to exercise the calling at the place designated; but an ordinance confining such a business to a small lot or even a particular block of ground is unreasonable and tends to create a monopoly. It has been said in the case of *City of Chicago v. Rumpff*, 45 Ill., p. 90:

“It can hardly be said that only a tract of one acre can be selected in a large city like Chicago where it would not be unhealthy or offensive on all the lands adjoining, or in its vicinity, or in other portions of the city.”

It does not seem to me to be a proper exercise of the powers expressly entrusted to the municipality by the legislature to create small districts which are not alike open to all desiring to pursue the same business, where an offensive business may be carried on. Such exercise of power does not appear to be in any way conducive, from a sanitary standpoint, to the comfort or well being of citizens in a community so densely crowded as Chicago.

The question as to whether the invalid portions of this section above referred to render the entire section void presents considerable difficulty in determination. One of the rules of construction applicable in this case may be stated as follows: If when the invalid portion of the section is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained.

The intention of the framers of this ordinance was apparently to render illegal the business of slaughtering, etc., within the city or within one mile of the limits thereof except (1) in the district bounded by Thirty-ninth street, Butler street projected and Western avenue, and except (2) where such business was not carried on prior to April 8, 1897.

Eliminating the second exception, the ordinance would

still provide a rendering district where slaughtering, etc., might legally be carried on. Whether this section with the invalid portion thereof eliminated would still be in accordance with what the City Council wished to enact with regard to the regulation of the location of slaughtering houses is at best a matter of conjecture, and it is impossible for me to determine conclusively whether this section with the objectionable exception stricken out would accord with what the council wished to enact on this subject. Everything should be presumed in favor of the validity of an ordinance, so far as may be legitimately done, and you should therefore not assume that the entire section is invalid or that the district created by Section 1052 of the code is legally non-existent.

Second. Referring to the ordinance submitted with your communication, I call your attention to the following provisions contained therein which I think affect its validity. Section 1050 of the proposed ordinance provides as follows:

“It shall be unlawful for any person, firm or corporation within the City of Chicago or within one mile of the limits thereof to engage in the business of slaughtering animals for food . . . unless he or they shall have obtained a license for such business, and then only so long as said license shall remain in force. The Mayor is hereby authorized, in his discretion, to issue a license for such purpose to any person, firm or corporation applying to him in writing for the same, upon such conditions as the Mayor may, in his discretion, embody in said license.”

Clause 81 of Section 62, Chapter 24, Hurd's Revised Statutes, 1901, page 288, gives the City Council and Mayor the right to direct the location and regulate the management and construction of packing houses, renderies, tallow chandleries, bone factories, soap factories and tanneries within the limits of the city or within the distance of one mile without the city limits. The provisions of this section of the ordinance referred to I think are invalid in that they do not specify the general requirements by compliance wherewith all persons so desiring might be granted licenses. It would be proper for the City Council to adopt a general ordinance for the purpose of directing the location and regulating the man-

agement of packing houses, etc., which prescribed a general rule by which licenses might be obtained. It might prescribe the character of persons who might or might not obtain licenses, or prescribe certain conditions to be performed by the applicant, and the question of whether the applicants were of the required character and had complied with the conditions could be left for determination by the Mayor. The ordinance should be of that general character that all persons coming within its requirements should be entitled, by complying with its provisions, to receive a license.

City of East St. Louis v. Wehrung, 50 Ill. 28;

McRoberts v. City of Sullivan, 67 Ill. App. 436;

Naegle v. City of Centralia, 81 Ill. 334;

Am. & Eng. Ency. of La, Vol. 15, p. 1043;

Dillon on Mun. Corp., Vol. 1, Sec. 96.

The provision of this section being invalid, the following section, 1051 of the proposed ordinance, will necessarily be incapable of providing for the objects mentioned therein so far as relates to such license.

Section 1052 contains the obnoxious provision, before referred to, establishing a limited slaughtering district capable of occupation by but a few concerns. This section also provides for the issue of a permit to carry on business outside of a certain district while it does not necessitate obtaining such a permit by a person located within the district. The permit here mentioned is the practical equivalent of a license, and the ordinance providing for such permit might better be drawn along the lines I have suggested with respect to the license provided for in Section 1050.

Third. Has the city the right to create a new rendering district necessitating the removal of many plants and thereby involving great financial loss upon the owners?

A slaughter house is declared a nuisance by the City Council of this city, Section 1028, Municipal Code, 1897, wherein, in addition to the nuisances defined by various sections of Article 18, "those offenses which are known to the common law of the land and the statutes of Illinois as nuisances" are also declared to be nuisances and subject to abatement, and this class of establishments has been judicially

determined to constitute a nuisance *per se* in the following cases:

Harmison v. City of Lewiston, 46 Ill. App. 164;

Watertown v. May, 109 Mass. 315;

16 Am. & Eng. Ency. of Law, 952.

In *Chicago Packing Company v. City of Chicago*, 88 Ill. 224, the character of such establishments is plainly indicated in the opinion of the court:

“The General Assembly, by this enactment (81st clause, Section 62) assumes and virtually declares that this character of business (slaughter houses) in or near to cities and villages is noxious to the health or comfort or both, of their dense population. And this is so certainly true that it is believed that the great mass of civilized people know it from experience or observation. The very character and inherent nature of the business are such that the employment of most approved plans and best precautionary means is believed to be inadequate to entirely prevent these establishments from being offensive in thickly settled districts.”

Such being the accepted character of plants of this description, I apprehend that they are amenable at all times to such reasonable regulations as to their location and management as the City Council may from time to time prescribe in the interests of a growing population. The fact that the owners have large financial interests involved in such plants, while it may add to the hardship of their removal does not restrict the right of the City Council to exercise the power of re-locating districts as they see fit, provided such power is exercised in a reasonable manner and not oppressively or vexatiously. Every right, from absolute ownership of property down to a mere easement, is purchased and held subject to the restriction that it shall be so exercised as not to injure others. Though at the time such a business be remote and inoffensive the owner is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to the ordinances and other regular remedies for the suppression of nuisances.

Coates v. Mayor, etc., of New York, 7 Cowen, 585;

Fertilizing Company v. Hyde Park, 7 Otto, 669.

In *Huesing v. City of Rock Island*, 128 Ill. 465, the court say:

“Under paragraphs 83 and 84 of our incorporation act, we think the power is conferred upon incorporated towns to prohibit slaughter houses or any unwholesome business or establishment within the incorporation; and the Common Council of the town by appropriate ordinance may regulate the location of any unwholesome business and may cleanse, abate or remove the same.”

Fourth. Irrespective of the validity or invalidity of Section 1052 of the Code of 1897, for reasons I have heretofore expressed I consider the amendments creating and limiting slaughtering districts illegal in themselves, and consequently do not consider it necessary to discuss here whether they are rendered void by the invalidity of the preceding part of the section which they amend.

Fifth. Can persons compelled to move under this ordinance recover against the city for the enforcing of an illegal ordinance?

From information I have gathered from the health department regarding the persons who are compelled to move, I find that only such persons were compelled to move as were violating the health ordinances of the city with reference to nuisances. The nuisances created by the establishments of such persons could be abated by the health department of the city at any time or in any place. From the facts stated in your communication, I think that you are not warranted in assuming that the city would be liable for damages in suits brought by the owners of such establishments. The ordinance in question will be presumed to be valid until the contrary is announced by a court of competent jurisdiction.

I return herewith the proposed ordinance and the advance sheets of the new code.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 14, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

In compliance with your request for an opinion on "the right of the city, through its police power, to enforce an ordinance prohibiting public exhibition of persons charged or convicted of crime, or of persons by reason of such association or relation closely associated or related to any person charged or convicted of crime, or of any article, thing or evidence incidental to the commission of such criminal act," and further requesting the submission of a proper ordinance to enforce such right, the resolution calling for such opinion and ordinance appearing on page 1709 of the proceedings of the City Council, I beg leave to say:

The legislature of the State of Illinois recently passed an act (Vol. 4, S. & C. Ann. Ed. Ill. Statutes, Chap. 38, paragraphs 150, 152, inclusive), in the words and figures following:

"An Act to prohibit public exhibitions of persons who have attained notoriety through some criminal act, also of persons whose deformity is such as to attract public curiosity, and to provide a penalty therefor."

Approved April 22, 1899. In force July 1, 1899. L. 1899, p. 148.

"150. *Unlawful to exhibit for pecuniary gain criminals and deformed persons.*] Sec. 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN THE GENERAL ASSEMBLY: That it shall be unlawful for any person or persons, company, firm or corporation to publicly exhibit for pecuniary gain persons who have become conspicuous through some criminal act which has a tendency to degrade human morals, to exhibit their pictures or any article which appertains to them in their attainment of criminal notoriety, and to exhibit persons whose deformity is such as to attract public curiosity.

"151. *Penalties.*] Sec. 2. Every person who shall violate the provisions of this act shall be subject to a fine of not less than one hundred dollars (\$100) or imprisoned in the

county jail not less than thirty (30) days nor more than ninety (90) days, or by both such fine and imprisonment.

“152. *Disposition of fines.*] Sec. 3. All fines collected for violation of this act shall go to and become a part of the school fund of the county wherein the prosecution for said violation was held.”

I am of the opinion that under this act prosecutions may be instituted for the punishment of the persons connected with all of the exhibitions recited in the preamble of your afore-said resolution. I understand that the exhibition referred to in said resolution, is of Mamie Dunn, who is said to be the “sweetheart” of VanDyne, one of the members of the band of desperadoes implicated in the murder of Officer Driscoll and others, the blacksmith who is said to have participated in the capture of VanDyne, and the “dug-out” in which the desperadoes were entrenched and besieged by the police. Both of the persons above referred to are, in my opinion, “persons who have become conspicuous through some criminal act which has a tendency to degrade human morals,” while the dug-out is clearly “an article which appertains to them (the criminals) in their attainment of criminal notoriety.” The quotations in the last foregoing sentences are from said statute.

The city has the undoubted right to pass an ordinance for the prohibition of such exhibitions and the punishment of offenders thereunder, by virtue of its charter powers in Clauses 51, 58 and 66 of Section 1 of Article 5 of the Cities and Villages Act. I deem it unnecessary, however, to discuss this question of power, or quote such sections, or submit an ordinance, for the reason that the State statute affords an ample remedy, and municipal legislation on the subject seems, therefore, to be unnecessary. I further call your attention to the fact that the Mayor has already under this statute taken steps to put an end to the exhibitions.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 14, 1903.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At the last meeting of your honorable body you referred to the Corporation Counsel for opinion, draft of order in regard to the removal of the tracks of the Chicago Terminal Transfer Railroad Company, together with a petition from said company, by its president, addressed to the City Council. (C. P., 1746.)

Your order of reference to this department and request for an opinion do not define, or in any manner indicate the points upon which you desire the opinion to be expressed. The matter, however, has been before the council frequently, and the legal status of the proceedings which recently terminated in the Supreme Court of Illinois, have been so often presented to your honorable body that I shall assume that no expression of opinion is required as to any of the matters involved in said litigation, that litigation having been definitely closed by two judicial determinations that the ordinances of the company involved have expired. All other pending legal proceedings have been disposed of in harmony with the decisions of the Supreme Court. The only new matter involved in the documents referred to this department, is the suggestion of the Chicago Terminal Transfer Railroad Company, by its president, contained in the petition above referred to, as follows:

"This company is advised that the people residing west of 48th avenue are desirous of having some street railway corporation acquire rights and operate cars west of South 48th avenue, and if that be true no public good will be conserved by tearing up the tracks west of that point."

Said petition concludes with the following language:

"And respectfully asks your honorable body to pass such order in the premises as will best conserve public interests."

If this be deemed to constitute a suggestion by said company, that the council should pass an order authorizing the tracks in said street to remain upon the street, unused, until the right to operate street cars in said street shall thereafter

be given to this or some other corporation or individual who may thereafter utilize such tracks; and if your request for an opinion is meant to desire an expression as to the legality of this course, I feel compelled to state that such a council order or ordinance would, I believe, be illegal. Apart from any question as to whether or not such ordinance is valid without frontage consents, the suggestion is open to the fundamental objection that while the City Council, under proper circumstances and upon proper frontage consents, has the right to thus authorize the laying of tracks for use in the transportation of persons over the public streets, it has no power to authorize the laying of tracks except for such use. The maintenance of street car tracks in a street is only justified by reason of the nature of the purpose for which such tracks are to be thus used, to wit: the transportation of the public along the public highway. The laying or maintenance of tracks not to be used, is, in my opinion, beyond the power of the City Council.

Herewith I return the council order and petition referred to above.

Very respectfully yours,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 14, 1903.

MR. H. O. NOURSE,

Superintendent Water Collection Department.

Dear Sir:

Replying to your communication of December 8, in relation to letter from the Crane Company dated December 5, in regard to the grouping of meter readings of all meters in all premises operated by the Crane Company:

Section 17 of the Water Ordinance, Class 11, Paragraph 6, on page 315 of the Council Proceedings of 1903, reads:

“In cases where water is controlled by meter not more than one meter will be permitted in connection with any one building, that is to say, two or more meters shall not be permitted in connection with any given premises, except in cases of manufacturing plants covering large areas of ground,

where various detached buildings are located, in cases of railroads, whose stations and depots are remote from each other, and at elevated railroad stations, and such like premises."

Paragraph 8 of the same class and section on the same page of the Council Proceedings reads:

"The charge shall be for each 1,000 gallons of water used on each independent premises, measured and registered by meter up to and not to exceed 165,000 gallons per month, ten cents per 1,000 gallons, etc. . . ."

It is my opinion from the reading of the ordinance that it was the intention of the legislative body enacting the same, that the words "independent premises" mean only those premises in the same immediate locality and under the operation and control of one management and all used practically for the same purpose, and that only such premises should have the meter readings from the meters controlling the supply of water to those buildings, grouped into one account for the purpose of payment. That by no possible construction of the ordinance would you be justified in grouping readings of meters in buildings separated from each other by any considerable distance, and not constituting "independent premises" even if they were a part of the business of one individual firm or corporation.

In the quotation from Paragraph 8, Class 11, Section 17, referred to above, the ordinance specifically states that the charge shall be for each 1,000 gallons of water used on each independent premises and it surely could not be contended that the plant of the Crane Company on the west side and their plant on the south side for instance, are not independent premises. If the contention of the Crane Company should be sustained, it would mean that every owner of real estate in the City of Chicago owning more than one piece of property, no matter where situated nor for what purpose used, would have the right to have all the meter readings grouped into one account, and many of the office buildings in the down-town district being owned by the same owners, such as the McCormick estate, Marshall Field or L. Z. Leiter, would come under the same head.

In my opinion the contention of the Crane Company is

not sustained by the ordinance, and the method of computation of these accounts should be governed strictly by this ordinance, which provided that such independent premises shall be charged for under a separate account.

All of which is respectfully submitted.

Yours very truly,

FRANK L. CHILDS,

Attorney,

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

DECEMBER 21, 1903.

MR. R. S. WILCOX, Secretary,

Department of Steam Boilers and Steam Plants.

Dear Sir:

Replying to your letter of the 3d inst., inquiring as to whether or not a dealer in second hand boilers is entitled to a certificate of inspection on a 72 inch boiler with a $\frac{3}{8}$ inch shell, and with horizontal seams, lap jointed and double riveted, which certificates shall state that such boiler will stand a pressure of 100 pounds per square inch, I beg leave to advise you, that Section 9 of the ordinance on steam boilers and steam plants requires that:

“All boilers hereafter installed, having cylindrical shells or drums of more than forty-two inches diameter, and carrying more than twenty pounds steam pressure, must have all longitudinal seams butted and held together by straps riveted over them.”

If a boiler does not come within that description, then you should not permit it to be installed, even though the owner may have a certificate of inspection issued under Section 21 of the ordinance. Said Section 21 defines how dealers in second hand steam boilers may procure a certificate, which section is in part, as follows:

“All steam boiler manufacturers, second-hand steam boiler and junk dealers, . . . must, before painting the same have them inspected by the Department of Steam Boilers and Steam Plants, and have in their possession a certificate

issued by said department, showing the amount of pressure per square inch the said steam boiler . . . is allowed to carry before offering for sale any second-hand steam boiler, . . . and give the buyer the said certificate of inspection. . . ."

In my opinion there is no conflict between these sections. If the second-hand dealer has for sale a boiler which is not constructed according to Section 9, then it should not be installed in this city; but you may, nevertheless, issue a certificate on such boiler under Section 21, showing the pressure per square inch. That certificate, however, will not entitle the boiler to be installed in this city, except as provided in Section 9.

In order to avoid the objection you suggest, you might stamp across the face of such certificate that such boiler must not be installed in this city under a pressure greater than twenty pounds.

Yours very truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

DECEMBER 21, 1903.

MR. WILLIAM MAJOR,

Chairman Committee on Finance, of the City Council.

Dear Sir:

The letter of the secretary of your committee, of November 12th, with stated enclosure, in regard to claim of the Railroad Supply Company, has been referred to me for reply.

As stated in the attached papers, the ordinance was passed on June 25, 1900, granting to the Stockham Manufacturing Co., its successors or assigns, the right to build a switch track at its plant, in consideration of the payment of fifty dollars per annum. The bond required by the ordinance was filed November 12, 1900. On the failure of the grantee, or its successor, to pay the compensation contracted for, the ordinance was repealed on January 26, 1903. This grant was in exist-

ence two years and seven months, and under the compensation provision of the ordinance, the city should have received \$129.16, which amount, less the \$50 paid on April 11, 1903, this department has been endeavoring to collect from the grantee, or its successor. I am informed that the track was never built.

However, the fact that the grantee, or its successor, did not avail themselves of the privilege granted, does not, in my opinion, affect its obligation to carry out the provision of the contract as to payment.

I am, therefore, of the opinion that by the filing of the bond, the licensee accepted the ordinance, and the claimant is not entitled to the \$50 already paid, and is legally liable to the city for the unpaid balance.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

DECEMBER 30, 1903.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Replying to your inquiry of the 23d inst., as to whether it is the duty of the City of Chicago, the Sanitary District or the United States Government to remove from the Chicago River an abandoned vessel that has become an obstruction to navigation, I beg leave to advise you that Congress has enacted laws governing this question. Section 15 of the "Act for the preservation and protection of rivers and harbors, and of improvements," passed March 3, 1899, provides in part as follows:

"Whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, . . . it shall be the duty of the owners of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the

same to removal by the United States as hereinafter provided for." ~

Section 16 of said act provides that any person or corporation, who shall wilfully obstruct the channel of any waterway in the manner contemplated in Section 15, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment in the discretion of the court.

Section 17 of the act makes it the duty of the district attorney to prosecute all offenders against the act whenever requested to do so by the Secretary of War, or the officers and agents of the United States in charge of the river and harbor improvement, or the assistant engineers and inspectors employed under them by authority of the Secretary of War; or the United States Collector of Customs and other revenue officers. Such persons are empowered to swear out process, and to arrest and take into custody any such offenders:

Section 19 of said act provides that whenever the navigation of any river, canal or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft or other similar obstruction, and such obstruction has existed for a longer period than thirty days, such obstruction shall be subject to be broken up or disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same. Said section also provides that the Secretary of War may cause sealed proposals to be solicited by public advertisement for a removal of such obstruction. You will see from the foregoing that the United States Government has jurisdiction of proceedings for the removal of obstructions of this character in navigable waters, and that it is made the duty of the United States officials to remove the same.

Answering your second question, I am of the opinion also that it is not the duty of the city to cause the removal from

the river of obstructions placed there through no fault of the city.

Very respectfully yours,
MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:
EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 30, 1903.

HON. LAWRENCE E. MCGANN, Comptroller.

Dear Sir:

Your letter of December 16, regarding the report of the County Collector to the City Treasurer of tax collections for the year 1902 has been referred to me.

From your letter it seems that the County Collector has taken credit for an item of taxes "forfeited to the State" and you ask what can be done to realize on such uncollected levies.

Under the statute the County Collector is entitled to this credit, but the taxes upon forfeited property are to be extended against that property in subsequent years.

The County Collector has also taken credit for an item of "judgments refused" and you ask if that is final. The judgment is final, but subject to the right of appeal, and may be reversed upon such appeal.

He also takes credit for an item of taxes "enjoined" and you ask what steps are taken to dissolve injunctions. To make a complete answer to this question it would be necessary for us to know all descriptions of the property upon which the taxes are levied, and to examine thoroughly into each particular case. Without a knowledge of the description of the property we cannot give any more definite answer.

He has also taken credit for taxes "appealed" and you ask what steps are taken to secure final trial and payment. As we do not know what property is involved in these cases, it is impossible for us to tell what steps have been taken in the cases.

He has claimed credit for "errors." We do not know what he means by this.

He has taken credit for "uncollected personal taxes" and you ask whether the city can proceed to collect any portion of these. The statute provides that suits may be brought by the County Board to recover uncollected personal taxes, and that the proceeds shall be distributed to the corporate bodies entitled to the tax. This would seem to leave the control of the suit in the hands of the County Board.

He has taken credit for an item "Paid County Collector as successor to Town Collector", and you state that you have been informed that he retains 2 per cent of the amount "collected by him as successor to the Town Collector, amounting to \$48,000." Does he take this amount in addition to the amount claimed and taken as his compensation as City Collector? He is not entitled to two commissions upon the money collected by him, even though he holds two offices. As Town Collector his commissions are limited to \$1,500 per year. It would probably be held by the court that each Town Collector would be entitled to commissions to that amount, but that would not bring the total up to the figure taken by the County Collector. We believe that he is not entitled to the full amount of this item. The difference between the 2 per cent commission upon taxes collected and the \$1,500 allowed to the collector should go to the taxing body. It does not belong to the collector.

The last item for which the County Collector claims credit is for "County Clerk's extensions." Assuming that this means the charge made by the County Clerk for extending the several taxes against the property, we have to say that in our judgment it is proper to make a charge of "two (2) per cent for each tax on each tract or lot and each person's personal tax to be paid by the authority for whose benefit" the tax is extended.

We do not believe that either the County Clerk or the County Collector can be persuaded to treat these extensions as but one extension, and thereby lessen the cost. Such a

course would not decrease the amount of work he is required to perform.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

DECEMBER 30, 1903.

MR. CHARLES J. BUHMANN, Superintendent of Bureau of
Maps, Department of Public Works.

Dear Sir:

I acknowledge receipt of your letter of November 23, with attached plats, asking an opinion as to whether the City Council has the power to vacate a portion of a sidewalk, to-wit: the inside eight (8) feet of a fourteen (14) foot sidewalk on the south side of Ogden place, between Ogden avenue and Wood street.

By Clause 7 of Section 63 of Article 5 of the General Incorporation Act, under which act this city is organized, the council has been granted power, in general terms, to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve its streets and sidewalks, and vacate the same. Also by Section 1 of Chapter 145 of the Revised Statutes it is provided that no City Council shall have power to vacate or close any portion of any street or alley except upon a three-fourths majority vote of all the aldermen of the city, and such vote shall be taken by ayes and noes, and entered on the records of the council.

Under the above provisions the council has the power to determine whether or not a sidewalk of a certain width is any longer required for the public use and convenience. In the present instance the council evidently concluded that a fourteen foot sidewalk was not required at this point. Of course, the council has no power to vacate a portion of any street or sidewalk for the sole benefit or use of a private individual or at its mere pleasure.

The records of the council show that on February 24,

1896, page 1989 of proceedings, the ordinance for the vacation of this strip of land was passed by vote of ayes, 61; noes, none. The proceedings furnish no idea of the purpose of the council in vacating this strip, but they no doubt concluded that a fourteen foot sidewalk was not necessary at this point, and that the city's interests would be better subserved by diminishing the width thereof, and thus freeing the municipality from the duty and burden of keeping it in good and safe condition and repair.

I am therefore of the opinion that this vacation is legal.
City of Mt. Carmel v. Shaw, 155 Ill. 40.

Answering your question as to whether the comptroller may place this vacation on record, I beg leave to advise you that neither the statutes nor the ordinances have any provision for the execution and recording of an instrument showing the vacation of a street or alley by municipal authorities. Whether the city acquired by dedication the fee of this strip of land, or an easement only, is not material, as on the vacation thereof the fee reverted, by operation of law, to the original dedicator or his heirs, if it was a statutory dedication,—and to the abutting owners, if a common law dedication. So far as I know no one is charged with the duty of filing such a vacation in the office of the Recorder of Deeds. I return the plats herewith.

Yours very truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 30, 1903.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

In answer to your favor of the 9th inst., in which you request an opinion as to the legality of an assessment for sidewalk interesections in cases where property owners have good sidewalks in front of their property, or have built new sidewalks within the forty days allowed by the statute, I beg leave

to say, the Supreme Court said in *Hyman v. City of Chicago*, 188 Ill. 462, speaking by Mr. Justice Cartwright on pages 463 and 464:

"In the County Court appellant objected that the ordinance was void, and he now presents several reasons in support of that objection. The first is, that the ordinance provides for the construction of intersections and the payment of the cost thereof by special assessment upon the property benefited. The parts of the sidewalk which are called intersections by the parties and witnesses are those portions not directly in front of lots but which fill out the spaces at the corners of blocks from the lot lines to the curb lines at intersecting streets. There is a space left at such places not directly opposite any lot, and known as an intersection. The statute, and this ordinance passed in pursuance of it, allows each owner thirty days to build a sidewalk opposite to his land and thereby relieve the same from assessment. It is apparent that if all property owners were to avail themselves of the privilege there would be no means of paying for the intersections by special assessment, and that part of the improvement would have to be made at public expense. Counsel says that if all the property owners except appellant, or a number of them, were to avail themselves of the privilege accorded by the statute and ordinance, they would be relieved from assessment by constructing the sidewalk in front of their property while he would be assessed for the cost of intersections or a portion of such cost. So far as the principle of justice and equality between property owners is concerned, the law and ordinance give to each one the same rights and privileges, and appellant, as well as any other owner, could have built his sidewalk and relieved his property from assessment. If he had done so he could not have been affected by the cost of intersections. Inasmuch as he could relieve his own property from assessment by building the walk in front of it, he must be taken to have preferred an assessment to building the sidewalk. He had a right to submit to the court the question whether justice required the city to pay for the intersections and ask the court to revise the distribution between the public and his property, but the decision of the

County Court on that question would have been conclusive. We have no right to review the question whether the city ought to pay for the intersections. (*Bickerdike v. City of Chicago*, 185 Ill. 280.)

In view of the above decision it is my opinion that the assessment for sidewalk intersections, where property owners have good sidewalks in front of their property, or have built new sidewalks within the forty days allowed by the statute, is not legal.

Respectfully yours,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 30, 1903.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

Replying to your letter of the 11th inst., asking as to the best method to adopt to force the Jefferson Building Company to comply with the fire escape ordinance, I beg to advise you that I am informed by the city prosecutor that the proceedings already had have been against J. W. Brown, personally, who is the president of the company, and that the prosecutions have been under Section 209 of the building ordinance, which provides that all buildings of a certain class, of four or more stories in height, shall be equipped with one or more fire escapes. The penalty is to be found in Section 216 of the ordinance, which provides that any person, firm, company or corporation who violates any of the provisions of the ordinance, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than two hundred dollars (\$200); and that every such person, firm, company or corporation shall be deemed guilty of a separate offense for every day such violation shall continue.

To punish violations of this ordinance, an action in the form of debt, in the corporate name of the city, should be brought against the offending party, either by summons or

by warrant, and if the fine be not paid, the defendant may be imprisoned.

By Section 84, of the Cities and Villages Act, it is provided, that policemen in cities, shall be conservators of the peace, and all officers created conservators of the peace by this act shall have power to arrest, with or without process, all persons who break the peace or are found violating any ordinance of the city, or any criminal law of the State, and if necessary, detain such persons over night or Sunday, or until they can be brought before the proper magistrate.

Under Section 271 of the said act, the city is authorized to proceed either by summons or warrant. Said section provides, that in all actions for the violation of any ordinance of any city, the first process shall be a summons; provided, however, that a warrant for the arrest of the offender may issue in the first instance, upon the affidavit of any person that any such ordinance has been violated, and that the person making the complaint has reasonable grounds to believe that the party charged is guilty thereof; and any person arrested upon such warrant, shall, without any unnecessary delay, be taken before the proper officer, to be tried for the alleged offense.

Starr & Curtis, page 814.

The city is thus given by statute the right to inflict imprisonment as a penalty for the violation of an ordinance.

Instead of suing an officer of the company, it would be better, in my opinion, to sue the corporation alone, or jointly with its officers. Where suit is against a corporation, you may proceed against it in several ways: Begin several suits against it, file transcripts of the judgments in the Circuit Court, then levy on the company's property and sell it. Also, you may enforce the collection of such judgments by a garnishment proceeding against the tenants of the building. Also, in order to coerce the payment of the fines, you may make such officers of the company who have control of its business parties to the suit and bring them in by warrant, and, in default of the payment of the fine, you may have them imprisoned.

In re Bollig, 31 Ill. 94-96.

City of Chicago v. Kenney, 35 Ill. App. 66.

People of Michigan v. Detroit White Lead Works et al.,
9 L. R. A. 722.

Very truly yours,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

DECEMBER 31, 1903.

MR. WALTER J. RAYMER, Chairman Sub-committee on Elevated
Railroads, of the City Council.

Dear Sir:

I have your communication of recent date requesting an opinion as to the power of the city to (1) compel the company owning or leasing the "Union Loop" to change the structure of the elevated railroad with a view to deadening the noise made by the running of the trains; (2) suggest the style of improvement which the company shall use to bring about this result; (3) compel the company to light the street under its said structure.

The present loop line in this city is now operated by the Northwestern Elevated Railroad Company by transfer to it of the rights of the various elevated companies who constructed the sides of the loop other than the one constructed by the company itself. There is not now, nor has there been, so far as I am aware, any such corporation operating the elevated railroad known as the "Union Loop Company" and I infer that by this name you refer to the corporation now operating the "Union Loop."

1. I find no special provision in any of the ordinances granted to any of the companies which constructed the "Union Loop" requiring them to adopt any particular method of construction having for its purpose the deadening of the noise made by the operation of trains, although such provisions are found in several of the ordinances with reference to the style of motive power to be used by the various companies. The privileges enjoyed by the several companies in the mainte-

nance of their lines of elevated railway in the streets and the operation of their cars thereon are to be exercised in the interest of the public, and it was to serve the public that such privileges were granted to them. They may therefore be subjected to municipal regulations of a greater scope, in the interest of the public at large, than a railroad company exercising its franchises on its own road bed. In the exercise of its police power the city may enact ordinances relating to the comfort, health, convenience or general welfare of the citizens, and the elevated railroad companies in question hold their property subject to the proper exercise of this power by the municipality.

City of Chicago v. Jackson, 196 Ill. 496;

Dillon on Municipal Corporations, Section 212;

Bancroft v. City of Cambridge, 126 Mass. 438.

I am of the opinion that the city has the power to compel the elevated railroads operating in the streets of this city to adopt structural changes which will tend to minimize the noise occasioned by the operation of their trains.

2. I think the city authorities would have the right to suggest the style of improvement calculated to produce the desired effect of diminishing the noise of the operation of trains, but not to compel the adoption of a particular method of construction by the company, unless it were conclusively shown that such method were the only one capable of producing the desired results. The company would have the option of using and adopting any one of a number of methods which would in an equal degree lessen the noise of train operation.

3. Provided the adoption of structural changes at the instance of the city caused a greater obstruction in the light passing to the street surface than is now occasioned by the present structure, I think the city would have the power to compel the elevated company to illuminate the street under its structure. The case then presented would be similar to one arising in the case of track elevation where a railroad company, after it has elevated its tracks, may be compelled to light the subways at street intersections. The illumination of a street in the case under consideration would be but a nec-

essary adjunct to the general scheme of structural change rendered necessary to accomplish the purpose of reducing the noise, and I think that in case the light in the street were decreased by such change, the city could compel the elevated railroad company to restore the portion of the street to its former condition with respect to the amount of light which has been cut off in consequence of such changes.

I am also of the opinion that should the health, safety or convenience of the public require, under the police power vested in the city the company could be required to illuminate the portions of streets under the structure, as now maintained, to a reasonable extent and in a reasonable manner.

Very truly yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 2, 1904.

MR. F. W. BŁOCKI, Commissioner of Public Works.

Dear Sir:

Your letter of December 30, 1903, enclosing correspondence from the Superintendent of Water, regarding water tax charged against the Armour Elevator Company and asking for "an opinion with reference to the frontage tax against this company and like concerns fronting on the river, where such concerns take water from the river by means of connections made through the docks for such purpose and whether or not such concerns have the right to make such connections without first securing permission from the City of Chicago," has been referred to me.

In this State the rule is that persons owning lands abutting upon a river, or through which a river runs, have the right, in common with others similarly situated, to devote to their own use so much of the water in the river as is reasonably necessary to satisfy the demands of their business, the other owners being considered.

The city has no control over this matter, and cannot collect any charge for the water thus used.

In operating the water works the city is engaged in the private business of selling water. By its water ordinance it offers to sell water upon either of two bases; meter rates or frontage rates. Those applying for water upon the meter rate basis must pay that rate, and those applying for it upon the frontage rate basis must pay the frontage rate. In selling upon the frontage rate basis the quantity of water used is not considered, nor is the use to which the water is put. The fact that he also draws water from the river has no bearing upon the rate.

Unless this is a case requiring the placing of a meter, this company must pay the frontage rate.

Herewith we return the correspondence and plat attached to your letter.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 6, 1904.

MR. WILLIAM MAVOR, Chairman of the Committee on Finance,

Dear Sir:

In re claim Barney Benson & Son:

In your communication of recent date relating to the above matter, you request the Corporation Counsel to furnish an opinion as to the rights and liabilities of the city where it has directed the demolition of buildings and contracted therefor.

First. I think that by Article V, Section 1 of the Cities and Villages Act (Clauses 7, 10, 14, 62, 75, 76, 84 and 96) the City Council was invested with power to contract, or authorize other city officers to contract, for the removal of encroachments upon the streets or alleys, dangerous structures and other nuisances, and the city has delegated this authority by ordinance to several officials (Sections 1605, 1606,

1614 and 1616 inclusive, Rev. Code, 1897). The city, therefore, is liable under agreements entered into with contractors, for the removal of dangerous buildings and other nuisances, according to the terms thereof (so far as the question of charter power is concerned) upon the principle that a city in exercising the powers granted to it, where not restricted in this respect must have a choice of means adapted to the ends sought to be accomplished and is not confined to any one mode of operation. *Kilvington v. City of Superior*, 83 Wis. 222. *Kelley v. Broadwell*, 92 N. W. 643. *Parker v. City of Philadelphia*, 92 Pa. St. 401.

Second. Your other query referred to the obligation, if any, of the owner of the structure demolished to reimburse the city for the cost of destruction. There is a surprising dearth of authorities upon this point and the Illinois courts have held that a statute authorizing the tearing down of buildings by a city is to be construed in favor of the owner of the building, and ordinances passed to carry into effect such a power must follow the statute and should not be broader than the legislative enactment. *Village of Louisville v. Webster et al.*, 108 Ill. 414; *Ward v. City of Murphysboro*, 77 Ill. App. 549. See also *City of Marion v. Robertson*, 84 id. 113. While entertaining considerable doubt upon this question, yet in the absence of any adjudication of our Supreme Court bearing directly thereon, I incline to the opinion that upon principle the city's power may be upheld, under the sections of the Cities and Villages Act adverted to in the first paragraph hereof, to impose upon persons guilty of originating or continuing certain classes of nuisances the burden of refunding to the city the charges it has expended in abating such nuisances, *after* directing the guilty party to abate it.

In *Mayor and Aldermen v. Savannah & O. C. Co.*, 9 Ga. 281, it appears that the City Council by a resolution determined that the defendant was guilty of maintaining a nuisance by obstructing the drainage of certain low lands by continuing an embankment, and that the defendant be notified to remove the obstruction within a specified time by constructing an additional culvert; that in default thereof the culvert would be built by the city at the company's expense. Upon

these facts the court decided that the resolution of the council as regards the cost of construction was not a *judgment* by which the liability for such costs were settled and that the council had power to pass the resolution, there being an ordinance providing for the collection of expenses under such circumstances "by warrant of distress or by action on the case for damages." No express statutory authority to pass the ordinance referred to is mentioned by the court.

In *Boise City v. Boise R. T. Co.*, 59 Pac. 716, the court held that it was the duty of one conducting a business to protect the public from danger at his "own expense" and allowed the city to recover the expense of building a bridge across the defendant's ditch (which had been excavated prior to the incorporation of the city). The charter of the city gave it the power to prevent and abate nuisances and "provide for the removal and abatement thereof." See *Leach v. Waugh*, 24 Ill., 288; *Pierce v. Dart*, 7 Cow. (N. Y.) 609.

And it is well settled by a long line of authorities that if a person places an obstruction in the street or so uses his property as to endanger the public, he is not in a position to demand that the city shall repair his fault at *its own expense*, if he fails to remedy the defect after he has knowledge of it, nor is the city precluded from looking to him for indemnification if it is adjudged to pay and does pay damages for an injury caused by the obstruction or faulty conditions. *City of Sioux City v. Weare*, 59 Ia. 95; *Woburn v. Boston & L. R. Co.*, 109 Mass., 283; *Inhabitants of Swansey v. Chace*, 82 Ind. 303; *Robbins v. Chicago City*, 71 U. S. 657; *Chicago City v. Robbins*, 67 U. S. 418; *Lowell v. Boston & L. R. Co.*, 40 Mass. 24. In the last case it was said: "The defendants are bound in justice to indemnify them so far as they have been relieved from a legal liability."

Any constitutional objection to recovery in these cases may be disposed of by saying that in many States by statute the owner of a nuisance is expressly subjected to the penalty of refunding the amount expended in abolishing it and that such statutes have been sustained. *City of Independence v. Purdy*, 46 Ia. 203; *Lasbury v. McCague*, 76 N. W. 862; *Hawley v. Harrall*, 19 Conn. 142; *City of Bangor v. Rowe*,

57 Me. 436; *Philadelphia v. Dungan*, 124 Pa. St. 52; *Klingler v. Bickel*, 117 Pa. St. 326; *Ferguson v. City of Selina*, 43 Ala. 398; *City of Salem v. Eastern R. Co.*, 98 Mass. 431. (See Hurd's Rev. Stat., Roads, Sections 71 and 136.)

It should be observed, perhaps, that the right of the city here in question is not affected by reason of the remedies afforded by the Criminal Code (Secs. 221, 222 Hurd's Rev. Stat., 1901, Ch. 38, p. 631). *Wragg et al. v. Penn. Township*, 94 Ill. 11.

Returning again to the main question: Some courts hold that except in cases of necessity, to charge a person with the cost of abating a nuisance there must be a judicial determination on the question of the existence of the nuisance. *Joyce v. Woods*, 78 Ky. 386.

But the existence of the nuisance and his duty to remove it being judicially decided, the offending party must repay the expense of its abatement.

Barclay v. The Commonwealth, 25 Pa. St. 503.

However, I think it may be safely said that if the obligation to defray the cost of abating nuisances may be imposed at all, under the Cities and Villages Act, it may be imposed without the necessity of a judicial finding as to the existence of the nuisance, where the person responsible for its creation has been notified to remedy the objectionable conditions prior to any action by the municipal authorities, provided the nuisance has been declared *such by ordinance and comes* within one of the classes which the statute empowers the governing bodies of municipal corporations to conclusively denounce. These classes are, *first*, nuisances which in their nature are nuisances *per se* or are denounced as such by the common law or by statute; *second*, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. *Laugel v. City of Bushnell*, 197 Ill. 20; see also *King et al. v. City of Davenport*, 98 Ill. 306; *Baumgartner v. Hasty*, 105 Ind. 575; *Nazworthy v. City of Sullivan*, 55 Ill. App. 48.

This same test is applied by a court of chancery in deciding whether it will enjoin a nuisance without first compelling a resort to a court of law to determine the fact of the

existence of the nuisance. *Smith et al. v. McDowell*, 148 Ill. 51.

Among things classed as nuisances *per se* are permanent encroachments upon the street obstructing the free travel of the public, such as houses, barns, projecting foundations, trees, a gate across the highway, a projecting cornice (unwholesome or nauseous houses or places) excavations, dilapidated and decayed buildings.

Smith et al. v. McDowell, 148 Ill. 51;

D. L. & Q. R. R. Co. v. City of Buffalo, 158 N. Y. 266;

City of Valparaiso v. Bozarth et al., 153 Ind. 536;

State v. Leaver, 62 Wis. 387;

Hatton v. Village of Chatham, 24 Ill. App. 622 (barn);

McLean v. Matthews, 7 Ill. App. 599 (gate);

Bitzer v. Leverton, 57 Pac. 1045 (cornice);

Ch. 38, Sec. 221, Item 5, Hurd's R. S. (obstructions upon streets, alleys, etc.);

No. Chicago C. R. Co. v. Lake View, 105 Ill. 207;

Nazworthy v. City of Sullivan, 55 Ill. App. 48.

But it is to be remembered that city officers abating nuisances without an order of court are acting at their peril and if the alleged nuisance be not such in fact, no recovery can be had for the expense of such removal. *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1; also *C. & P. R. R. Co. v. City of Joliet*, 79 Ill. 25; *Munsell v. City of Carthage*, 105 Ill. App. 119.

Nuisances falling within the class which cannot be declared such by ordinance unless they are such in fact are those which in their nature are not nuisances, but may become so by reason of their locality, surroundings or the manner in which they may be conducted or managed, etc.

Laugel v. City of Bushnell, 197 Ill. 20. . .

Having, then, adopted the view that the City Council possessed the right to provide for a recovery of the costs of ridding the public of nuisances, the next step is to inquire whether they have exercised such right.

By ordinance (Sec. 457, R. C. of Chicago, 1897), the Commissioner of Buildings is given discretionary power to cause the tearing down, altering, etc., of dangerous, defective

or unsafe buildings, or those erected in violation of the building ordinance, and the owners thereof are thereby subjected to liability for the expense of such work. Among the many sections of the building ordinance (Secs. 272-456, inclusive), are several relating to fire limits, frame buildings, etc.

It is also provided by ordinance (Sec. 1633, R. C., 1897) that the Commissioner of Public Works may direct the removal of anything which encumbers the streets or alleys "under the penalties prescribed by law." (See also Secs. 1872, 1873.)

It is further provided (Sec. 1884) that the owner of any building, or other obstruction, upon any street, alley, etc., who neglects to remove the nuisance after the specified notice, shall be liable for the expense of removal, which may be ordered by the Commissioner of Public Works. It may be that to hold the owner of a building liable for the cost of removing obstructions under this latter section a second notice should be served to put Section 1884 in operation in addition to the notice prescribed in the previous section. At any rate, it is a safe practice to follow.

Owners of buildings which are nuisances because of their unsanitary condition are not made liable for the cost of demolition by the ordinance specifically relating to buildings of this character (Sections 2134 and 2135, Rev. Code, 1897), but the liability, in my opinion, exists by virtue of other ordinances relating to health and nuisances (Sections 1024 to 1028 inclusive).

It seems proper in connection with the subject of this opinion to call your attention to the limitations upon the power of the Department of Public Works to make contracts exceeding \$500, etc. (Sections 1615 and 1616 of the Revised Code, 1897). But a contract calling for daily payments, about \$40 a day for instance, when it can be terminated by the city at any time is not a contract the expense of which exceeds \$500.

Sanitary Dist. v. Blake Mfg. Co., 179 Ill. 167, 77 Ill. App. 287.

It follows then from what has been said that the City of Chicago has the power to make contracts with private firms for the abatement or removal of dangerous buildings, obstruc-

tions, etc., and that the sections of the city ordinances which I have cited as subjecting the owners of certain nuisances to the cost of abatement are valid. The power to pass these ordinances may be traced to the sections of the Cities and Villages Act referred to upon the first page of this opinion, or possibly upheld as a proper exercise of discretionary power incidental to the inherent police powers of the city to act for the health and safety of its inhabitants.

Respectfully submitted,

MACLAY HOYNE,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 8, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In answer to your request for an opinion as to whether or not the North Side Turner Hall may lawfully be opened for use under the existing building ordinance, I beg leave to say:

I have been informed that this building was constructed immediately after the Chicago fire, some time in the year 1872. It is what is known as "ordinary construction." It contains a main hall, which, with the balcony, has a seating capacity of 1,190. The main floor of this hall is more than eight feet above the grade of the street. It has two lodge halls on the fourth floor, with a seating capacity of 400; the capacity of each hall is not stated. The stairs of the lodge halls communicate with the stairs from the main hall to the street. There is an emergency exit, "rear fire-escape stairs", of four feet. The building faces upon only two open spaces. The main hall contained a stage and movable scenery, but I am informed that the movable scenery has been removed, so that the building may be regarded as in Class IV as defined in the present ordinance. The word "Exit" is not painted over all exits in letters six inches high. I have not examined the building, and base this opinion on the facts above stated, which are all the facts that have been submitted to me for consideration. The

said facts are gathered from the report of D. E. Stanhope, Deputy Commissioner of Buildings (hereto attached), and the oral statements supplementary thereto made to me by Mr. George Williams, the Commissioner of Buildings. The commissioner reports that the two lodge halls on the fourth floor, taken by themselves, comply with the ordinance; therefore no special discussion is necessary regarding those halls alone except as they affect the main question referred to hereafter.

Section 168 of the present building ordinance reads as follows:

Buildings of Class IV of greater seating capacity than 800 and all buildings of Class V, shall face upon three open spaces, of which at least one shall be a public street, while the two others, if not streets, must be public or private alleys of a width of not less than ten feet each."

Section 169 of said ordinance reads as follows:

"Buildings of Class IV, containing not more than 600 seats, may be built of ordinary construction. If they contain more than 600 seats and less than 1,500 seats, they shall be built of slow burning or mill construction. If they contain more than 1,500 seats, they shall be built of entirely fireproof construction."

Section 177 of said ordinance, so far as material to be quoted, reads as follows:

"In buildings of Class IV no auditorium containing more than 1,000 seats shall have the highest part of its main floor at a greater distance than eight feet above the adjacent sidewalk grades."

Section 178, so far as material to be quoted, reads as follows:

"Stairs in buildings of Classes IV and V shall be in width equivalent to eighteen inches for every 100 seats in such building—fractional parts of 100 being in each case counted as a full 100 seats— . . . A common place of exit and entrance may serve for the main floor of the auditorium and the first gallery, provided its capacity be equal to the aggregate capacity of the outlets from the main floor and the said gallery."

Section 187 reads as follows:

“All exits opening in buildings of Classes IV and V shall have the word “Exit” in letters at least six inches high, applied to the auditorium side and to the stage side of every exit.”

It will be seen that this building is not in compliance with any of the sections of the building ordinance above quoted, and the question of law presented is whether or not said sections apply to said building.

I have already stated, in an opinion of even date herewith, upon the general subject matter, that the first question in logical order is: Are the sections of the building code which are applicable to the question in hand, retroactive; that is to say, did the council intend them to apply to existing buildings? If this question be answered in the negative, no further consideration arises; but if it be answered in the affirmative, the question arises as to the effect of Section 160, which limits the retroactive provisions of the building ordinance to cases not requiring alteration in the construction or equipment of buildings existing at the time of the passage of the ordinance and then complying with the ordinance at that time in force, except where the immediate safety of the occupants of the building is concerned.

In my opinion, Section 169 is not retroactive; it contains the words “may be built” and “shall be built”; it plainly refers to future construction. The other sections above quoted are, in my opinion, retroactive, and are intended to apply to all buildings, including those in existence at the time of the passage of the ordinance. In the nature of the case, they are limitations upon the use of buildings for places of amusement and the accommodation of public gatherings.

The requirement of Section 168 is that the buildings therein described “shall face upon three open spaces.” The words, taken in their ordinary acceptation, are broad enough to include all buildings, and the section I think constitutes a limitation upon their use for the purposes under consideration unless they comply with the conditions stated.

Section 177 requires that no auditorium containing more than 1,000 seats “shall have the highest part of its main floor at a greater distance than eight feet above the adjacent side-

walk grades." This language is broad enough to include all auditoriums, and is a limitation against its use as an auditorium if its floor is more than the specified height above grade.

Section 178 provides that the stairs in buildings of Classes IV and V shall be in width equivalent to eighteen inches for every 100 seats in such building. This language is broad enough to include all buildings in said classes, and is a direct requirement that all such buildings shall have stairs of said width. This also is a prohibition against the use of buildings for the purposes included in said Classes IV and V without such stairs.

Section 187 is also a direct and continuing requirement for the maintenance of exit signs, applies to all buildings and amounts to a prohibition of the use for the purposes under consideration without compliance with said requirement.

It now becomes necessary to consider the effect of Section 160 upon the application of Sections 168, 177, 178 and 187 to the building in question.

I have already stated briefly my interpretation of Section 160. I think said section, so interpreted, presents the following questions in this case:

Do the three sections last enumerated require "alteration in the construction or equipment" of this building, it being a building which existed at the time of the passage of said ordinance and at that time complying with the ordinance then in force? The answer to this question is plainly an affirmative one; if so, the effect of Section 160 is to provide that the ordinance is not to be considered as applicable to said building, except in cases where the "immediate safety of the occupants" is concerned. What is the meaning of this expression, "the immediate safety of the occupants?" This language should be interpreted by giving to the words used their ordinarily accepted meaning. If the condition presented is one which an ordinarily intelligent and prudent man, acting upon the usual experience and judgment of mankind, would pronounce dangerous, under the conditions of use and occupation characteristic of such buildings, then I think a case would be presented where it would properly be said the safety

of the occupants is concerned. The word "immediate" is I think used in a double signification; it has at least two well defined meanings here applicable. The first is, close in relation of time; the second is, close in the relation of cause and effect—that is to say, the natural and direct result of a given cause without the intervention of another independent cause. The Century Dictionary defines the word "immediate" as "opposed to remote." I think the word has both meanings in this section. If the foundations were insecure and the building about to fall, this involves the immediate safety of the occupants of the building. If the condition was such that the danger was not remote, it was in that sense immediate. If, therefore, the conditions were such that an ordinarily intelligent and prudent man, acting upon the usual experience and judgment of mankind, would pronounce dangerous, under the conditions of use and occupation characteristic of such buildings, and would declare the danger not remote, but one which might naturally be expected to follow, without any intervening cause, when the building was put to the ordinary uses characteristic thereof, I think a case would be presented where it might properly be said the immediate safety of the occupants is concerned. The word "concerned" is very broad in its meaning. It is nearly synonymous with the words "affected" and "involved", but is broader than either term. If the act or condition in question in any way affects the safety of the occupants of the building, then to that extent the safety of the occupants is concerned.

Perhaps my duty has been already fully discharged by stating and determining the legal questions involved and defining the meaning of the expressions used. It is for the executive officer who is by law charged with the enforcement of this ordinance (the Commissioner of Buildings) to determine whether or no the facts exist which bring the building in question within the meaning of the ordinance as I have interpreted it. The questions presented for his determination in this case may be stated as follows:

First. Does the fact that the building faces upon only two open spaces affect the immediate safety of the occupants

of the building, when occupied and used for the purposes under consideration? If so, Section 168 applies.

Second. Does the fact that the main floor of the hall is more than eight feet above grade affect the immediate safety of the occupants of the building, when occupied and used for the purposes under consideration? If so, Section 177 applies.

Third. Does the fact that the hall with a capacity of 1,190 seats has only one stair exit, eight feet in width, and a rear fire escape four feet in width, affect the immediate safety of the occupants of the building, when occupied and used for the purposes under consideration? If so, Section 178 applies.

Section 187, in my opinion, applies without regard to the provisions of Section 160.

If the Commissioner of Buildings should conclude under the principles of interpretation above enunciated, that any of the sections referred to do apply to the North Side Turner Hall, he can only and lawfully permit such halls to be opened for use and occupied for the purposes above referred to after such changes have been made in the construction and equipment thereof as will cause them to comply with the provisions of the sections applicable.

Very respectfully submitted,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 8, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your verbal inquiry whether the provisions of the present building ordinance are retroactive; that is to say, whether they apply to buildings constructed prior to the passage of said ordinance, I beg leave to say:

I have carefully re-read the present ordinance, and find that this question is not susceptible of a direct answer, yes or no. Some of the provisions of the ordinance are clearly and expressly retroactive; as, for example, Sections 6, 10 and 11, which give authority to the Commissioner of Buildings to take precautionary measures in certain circumstances with relation to all buildings whenever built; Section 29-a-3, which requires

all elevators to be equipped with safety devices; Section 140, which prohibits the obstruction of stairs and fire escapes in any building, and Section 157, which expressly makes it the duty of the owner of every building of Class 1, "already constructed or hereafter to be constructed," to take certain precaution for the prevention of the overloading of the floors of the building. Others are clearly limited, by express language, to buildings subsequently erected, and are therefore not retroactive; as, for example, Section 139, which expressly refers to stairways "hereafter" constructed; Section 144-a, referring to safety devices for cleaning windows, which is expressly limited to "every building *hereafter* to be erected;" Section 176, which contains certain provisions expressly limited to cases of new construction. Still others, although they contain no express words to indicate whether they are to be considered as retroactive or not, clearly apply to all buildings; as, for example, those provisions relating to the use of existing buildings, the manner in which they shall be managed and the things which shall be done therein. On the other hand, many other provisions of the ordinance contain no express language to indicate whether or not they are intended to have a retroactive effect.

You have called my attention particularly to Section 170 of said ordinance, which reads as follows:

"Buildings of Class V containing less than 1,000 seats shall be of slow-burning construction or of mill construction, and if they contain 1,000 or more seats, they shall be built entirely of fireproof construction."

And you have inquired of me, in addition to the general inquiry above stated, whether or not this provision applies to buildings erected before the passage of said ordinance. For a proper answer to this question, the provisions of Section 169 ought also to be considered, said section being *in pari materia*. Said section reads as follows:

"Buildings of Class IV, containing not more than 600 seats, may be built of ordinary construction. If they contain more than 600 and less than 1,500 seats, they shall be built of slow-burning or of mill construction. If they contain more

than 1,500 seats, they shall be built of entirely fireproof construction."

It will be observed that every provision of Section 169 looks to the construction in the future of the buildings therein described. The words used are: "May be built" and "shall be built." Section 170 contains the words "shall be" and "shall be built." While the words "shall be" are possibly susceptible of application to existing buildings, yet I believe that the entire context of these two sections shows that the words "shall be" in Section 170 mean "shall be built." I am of the opinion that from the very nature of the provisions of Sections 169 and 170, said sections are not retroactive and do not apply to buildings constructed before the passage thereof.

You have also requested my opinion as to the effect of Section 160 of said ordinance, which, so far as material to be quoted, is as follows:

"Excepting in cases where the immediate safety of the occupants of buildings is concerned, nothing in this ordinance shall be considered as requiring alteration in the construction or equipment of buildings existing at the time of the passage of this ordinance and at that time complying with the ordinance at that time in force."

For a proper understanding of this section of the ordinance it is as important to define what it is not as to consider what it is. It is not affirmative legislation. It adds nothing to the balance of the ordinance. It is a mere proviso, or limiting clause, which takes away from the ordinance but adds nothing to it. In other words, the purpose and object of this proviso is, to limit those sections of the ordinance which are susceptible of a retroactive interpretation, but it is entirely barren of language sufficient to add a retrospective effect to those sections not in themselves retroactive. The purpose and effect of Section 160 may be stated more concretely as follows:

Those provisions of the ordinance which are retroactive shall not be so construed if they require alteration in the construction or equipment of buildings formerly erected in compliance with then existing ordinances, unless such alteration in the construction or equipment of such buildings is required

for the immediate safety of the occupants thereof. I think this to be a fair statement of the legal effect of Section 160, and as a result of this construction it will be seen that those sections of the ordinance not retroactive on their face or by clear implication are not made retroactive by said Section 160.

Having thus ascertained by a reference to fundamental principles of legislative construction the purpose and effect of Section 160, and having concluded that the same is not affirmative legislation, but is a limiting clause, or proviso, which adds nothing to the non-retroactive sections of the ordinance, and merely limits, under certain circumstances, the retroactive sections thereof, the way is clear for an examination of the meaning of the words employed in said section. The most important question presented is the meaning of the words "where the immediate safety of the occupants of the building is concerned." I think this language refers to conditions directly threatening the personal safety of those within the building, and that it does not refer to conditions which potentially may at some time in the future, and only in combination with other circumstances which may arise in the future, affect the safety of the occupants. This is shown by the use of the word "immediate", which not only means near in time, but near in the relation of cause and effect; that is to say, without the intervention of other contributing causes; it is also shown by the use of the word "is" instead of the words "may be." I therefore conclude that this refers to those conditions of the building like an insecure foundation, a leaning or bulging wall, or a defect of construction which on the face of it will present to the mind of the ordinarily intelligent observer the immediate conclusion: this is unsafe, and unsafe now; and also to those conditions, such as exits plainly inadequate in capacity, and methods of construction and arrangement clearly dangerous for the usual and characteristic uses of the building, which a person of ordinary intelligence and prudence would pronounce unsafe.

I am concerned, not with the question of what the ordinance should be, nor what the council should have done, but only with what they did do and with the actual legislative intent. Their intent seems to me clearly to have been to ex-

empt the owners of buildings of Classes IV and V—concert halls and theaters—from the necessity of rebuilding their edifices, except in those cases clearly specified in the ordinance where the council has said plainly that its provisions shall apply to existing buildings, and only then where the immediate safety of the occupants thereof is actually concerned. This construction of the ordinance leaves all those provisions governing the use and control of theaters unaffected by this exception. Those provisions where retroactive on their face remain and still are retroactive. Only those retroactive clauses which could not be enforced without such alteration of the construction or equipment of the building, are by said Section 160 suspended, and then only provided the “immediate safety of the occupants of the building is concerned”, within the meaning of the words as above defined.

Until a new ordinance is prepared it will be the duty of the Commissioner of Buildings, in construing the present ordinance, to determine the question of fact presented in the application of each retroactive section to the particular building in question. The new ordinance should clearly specify which sections are intended to be applied only to new buildings and which to buildings previously constructed.

Yours very sincerely,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 11, 1904.

MR. EDWARD M. LAHIFF, City Collector.

Dear Sir:

I have before me your letter of December 17, 1903, together with papers in the matter of application of William Dunn and George Hites for a license to conduct a dram shop at number 5050 State street.

The location in question is in the Town of Lake, and in order to procure a license to keep a saloon at said point it is necessary for the applicant to comply with Section 14, page 243 of the revised ordinances, Town of Lake, of 1887, which is as follows:

“All applications for license to keep a saloon shall be

made to the Board of Trustees in writing, stating the time for which such license is desired, not less than three months nor more than one year, signed by the applicant and accompanied by a petition of the majority of the legal voters of the town, residing within one-eighth of a mile from the place where such saloon is kept, such petition shall also state that the place where such saloon is to be kept does not fall within the restriction prescribed by Section 13 of this chapter and the license fee must also accompany each application."

You have requested this department to render an opinion as to whether a legal voter within the meaning of said ordinance is one whose name appears in the list of registered voters, or whether any person who is legally qualified to vote, whether registered or not, is meant.

The question involved has seemed to me of sufficient importance to warrant an exhaustive investigation. There have been attempts by some courts to distinguish between a "legal voter" and a "qualified elector", notably by the Supreme Court of Wisconsin in the case of *Sandford v. Prentice*, 28 Wis. 362, in which it was held that a "qualified elector" is a person who is legally qualified to vote, while a "legal voter" means a qualified elector who does in fact vote.

Webster's International Dictionary gives the following definitions:

VOTER—"One who votes; one who has a legal right to vote, or give his suffrage; an elector; a suffragist."

ELECTOR—"One who elects, or has the right of choice; a person who is entitled to take part in an election, or to give his vote in favor of a candidate for office. Hence, specifically, in any country, a person legally qualified to vote."

From the foregoing definitions it would seem that "voter" and "elector" are synonymous terms used interchangeably and meaning the same thing unless a different meaning appears from the accompanying language. For the purposes of this inquiry, therefore, the terms "legal voter", "qualified voter" and "qualified elector" may be assumed to mean one and the same thing. The question then is, can a person be said to be a legal or qualified voter who is not registered as

required by law? On this point there is some conflict in the authorities.

In North Carolina, for instance, the constitution requires registration as a condition precedent to the right to vote. Under this provision it is held that "qualified voters" are those only whose names appear upon the register.

Southerland v. Goldsboro, 96 N. C. 49;

Duke v. Brown, 96 N. C. 127;

Markham v. Manning, 96 N. C. 132;

McDowell v. Construction Co., 96 N. C. 514.

To the same effect is the case of *State v. Brassfield*, 67 Mo. 331, in which the court said:

"While the registration law was in force they only were qualified voters whose names were placed on the election books. This was the final, qualifying act, and no matter if a citizen possessed every other qualification, if not registered, he was not a qualified voter. It was not the right to register which constituted one a qualified voter, but the fact of being registered as such was also essential. A qualified voter is one who, by law, at an election, is entitled to vote. If by the law, a person was not entitled to vote, whether in consequence of a disability which deprived him of the right to register, or of his neglect to register with a perfect right to do so, he was equally disqualified."

It is also held in South Carolina that registration is an essential qualification of a voter.

Mew v. Railway Company, 32 S. E. 828.

There may be found a few other cases announcing the same doctrine, but the great weight of authority seems to be opposed to this doctrine and in favor of the proposition that registration does not constitute a qualification of a voter. In the following cases it has been held that "a law requiring registration as a condition of being allowed to vote imposes no new qualification, but is only a regulation of the mode of exercising the right to vote."

Capen v. Foster, 12 Pick. 485;

Page v. Allen, 58 Pa. St. 388;

Patterson v. Barlow, 60 Pa. St. 54;

Dells v. Kennedy, 49 Wis. 555;

State v. Baker, 38 Wis. 71;
Edmunds v. Banbury, 28 Ia. 267;
Monroe v. Collins, 17 O. St. 666;
Daggett v. Hudson, 43 O. St. 548;
Auld v. Walton, 12 La. Ann. 129;
Hyde v. Blush, 34 Conn. 454.

“The fifth section (constitution) directs the general assembly to provide by law for a uniform registration of the voters who possess the qualifications before described. The qualification to vote was required to exist before the person had the right to be registered; the registration consisted in making a list of those who were already duly qualified.”

Smith v. Stephan, 6 Cent. Rep. (Md. 1887) 432.

“By the term ‘qualified elector,’ we do not mean simply a registered voter, for we conceive that one may be a qualified elector, entitled to hold office, sit on a jury, etc., and yet not be entitled to vote, under the law, for want of a certificate of registration.”

“A qualified elector is one who is not embraced in any of the six sub-divisions of Article 8, Section 3, of the Constitution, and a certificate of registration is evidence thereof, the want of which is not conclusive as to the right of a claimant to office.”

White v. Reagan, 25 Ark. 622.

Where the constitution of a State provides that no aid can be voted to a railroad unless two-thirds of the qualified voters voted for the proposition, the court says:

“All persons duly registered are, no doubt, *prima facie* qualified voters, and should be admitted to vote, on the production of their certificates of registration. But it is two-thirds of the qualified voters who must vote for the proposition to secure its adoption, and not two-thirds of all whose names are found on the registration rolls.”

Austin v. R. R. Co., 45 Tex. 234-269.

The qualifications of a voter in this State are prescribed by the constitution of 1870, Article 7, Section 1, and are as follows:

“Every person having resided in this State one year, in the county ninety days, and in the election district thirty

days next preceding any election therein, who was an elector in this State on the first day of April in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this State prior to the first day of January in the year of our Lord 1870, or who shall be a male citizen of the United States, above the age of twenty-one years, shall be entitled to vote at such election."

It is well settled that where the qualifications of an elector are prescribed by a constitutional enactment, the legislature has no power to add other qualifications unless such power is expressly conferred by the constitution. It will be observed that the constitution does not prescribe registration as one of the qualifications of a voter. If, therefore, registration constituted one of the qualifications of a voter, the statute requiring it would be unconstitutional and void. It has been held, however, by our Supreme Court, that:

"By prescribing certain qualifications for voters the constitution necessarily intended that the legislature should provide some mode of ascertaining and determining the existence of these qualifications. A registry law is merely a mode of ascertaining and determining whether or not a man possesses the necessary qualifications of a voter."

People v. Hoffman, 116 Ill. 587.

In a very recent case the question arose whether one who was not registered was a "qualified elector" within the meaning of Section 2 of Article 18 of the constitution of Idaho, which provides in substance that "No county seat shall be removed unless upon a petition of a majority of the qualified electors of the county," etc. The court held that registration is not one of the substantive qualifications of an elector, but was merely intended as a regulation of the exercise of the right of suffrage, and not a qualification for such right.

Wilson v. Bartlett, 62 Pac. 416.

If, now, we look at the mischief which the ordinance in question was intended to guard against, we must conclude that the framers of the ordinance had in mind the injury that might be inflicted upon the people living in the neighborhood of the location of the proposed saloon, and required applicants to procure the consent of a majority. This part of the

ordinance being of a remedial character, should be liberally construed. As was said by our Supreme Court in a recent case:

“In construing ordinances, no less than statutes, all general provisions, terms, phrases, and expressions should be liberally construed, in order that their true intent and meaning may be fully carried out; . . . The persons who will be injuriously affected by a dram shop are not those, alone, who own property or reside or are engaged in business upon the street upon which it has its main entrance, but it directly affects the character and value of all the property in the block where it is located.”

People v. Harrison, 191 Ill. 257;

Harrison v. People, 195 Ill. 471.

So, in this instance, a legal voter who is not registered is just as likely to be injuriously affected by the presence of a dram shop near his home as though he were registered, and is just as much entitled to be consulted in the matter of the opening of a new dram shop.

For the reasons above indicate I am of the opinion that a “legal voter” within the meaning of the above mentioned ordinance, is one who possesses the qualifications prescribed by the constitution, regardless of whether or not he has been registered as such.

All papers and correspondence returned herewith.

Very truly yours,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 11, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

The matter of car license fees due from the elevated railroad companies operating in this city, and particularly the road hereafter mentioned, has been brought to this department many times during the past few years. In one form or

another there has always been some controversy existing between the companies, or one of them and the city, in regard to the payment of license fees or compliance with some of the provisions of the ordinances enacted for the regulation of elevated railroad companies and their business.

Litigation is pending, which, although prosecuted with all the diligence possible, under the circumstances, is necessarily delayed by the congested condition of the courts and the dilatory tactics to which the defendants therein have constantly resorted.

My attention has been called this morning to this matter by a letter from L. E. Gosselin, Auditor, stating that the Metropolitan West Side Railroad Company and the Lake Street Elevated Railroad Company have failed to comply with the requirements of the city ordinances which provide that such companies shall post, in a conspicuous place, in each car used by them, the annual license which they are required to take out.

Some time ago this department, at the request of the auditing department, gave an opinion that the method employed by these elevated railroad companies for the computation of their annual license fees was a clear violation of the ordinances. The method was pursued of determining the number of cars to be licensed by finding out how many trips were made in a given period of time and dividing those trips by an arbitrary number, said to be the equivalent of a single car's trip capacity in one day, and this quotient was returned as the number of cars employed, instead of the simple, obvious and direct method of counting the cars actually employed. In a single year this artificial method of computation produced a deficiency of over \$3,000 from the amount of license fees which would have been arrived at by multiplying the number of cars actually in use by 50.

I believe that the time has come when the city is no longer justified in simply instituting law suits and awaiting the slow procedure of the courts. If the questions involved were doubtful, it would perhaps be our duty to still submit to the necessary delays of the courts until those doubtful rights were passed upon by the judicial tribunals. But this question

is not a doubtful one, and litigation alone will, in my opinion, never result in a satisfactory settlement. The courts are not less than three years behind in their business, and we could not, therefore, hope to bring these companies up to within three years of their obligations.

The case of the Lake Street Elevated Railroad Company is particularly aggravated. This company was advised of the opinion of this department sustaining the validity of the ordinance which required the taking out of a license for each car and the posting of this license in a conspicuous place in each car, and although given an opportunity to produce their reason or authority against the correctness of the conclusion, failed to do either. Shortly thereafter, for the purposes of reorganization, those in control of the company thrust it into the hands of a receiver and it passed into the jurisdiction of a court of equity. Hoping that while it was thus under the control of the courts it might be possible to secure administrative compliance with the law, petitions were filed before Judge Tuthill for orders requiring the receivers to pay the amount of license fee due in arrears, to remove the unlawful signs from the station platforms and to take out a license for each car and post it therein in accordance with the ordinance. The purposes, however, which the interested parties had in mind when they caused the company to be placed in the hands of a receiver, were soon accomplished, and an application was made to dismiss the suit and discharge the receivers. This department opposed such motion, on the ground that the court should see to it, before it terminated its administration of this property, that the officers of the court, the receivers, strictly comply with the law and purge themselves of the disobedience of the law, of which they were guilty. The success of this move on the part of this department was prevented only by the solemn promises, in open court, of the attorneys for said company that they would comply to the utmost with the demands of the city, as set up in the aforesaid petitions, and but for this promise, for which the legal representative of this company gave his "word of honor", Judge Tuthill would have required the receivers to comply with the city ordinances, and this question would not now be open. These promises,

made under such peculiarly impressive circumstances, have not been complied with by the Lake Street Elevated Railroad Company, its legal representative or its administrative officers in any particular or to any degree.

On the matter of the maintenance of bill boards upon their platforms and structures, while every other railroad company complied with the law in this respect at the demands of the administrative officers of the city, and promptly removed said signs at their own expense, this Lake Street Elevated Railroad Company made no real move whatever toward the removal of such signs, and it was only recently that the signs were removed by the Department of Public Works after every other means sought to be employed had proved inadequate to persuade the officers of this company not only to observe the law but to comply with the "word of honor" thus given in open court.

The condition with regard to taking out car licenses and posting them in the cars presents an equally flagrant contempt for the law on the part of the representatives of said company and an equally flagrant disregard of the obligation of a promise given "upon honor." Car licenses have not been taken out by this company and posted in a conspicuous place in each car, but the same old method of evasion is still employed by a partial and pretended compliance with the ordinance.

Under these very aggravated circumstances, I respectfully submit to you, as chief executive officer of this municipality, whether the time has not come in our dealings with at least one of these public service corporations, to use the police power in enforcing an observance of the ordinances. I am of the opinion that you have the legal power to prevent any car being operated on any part of the elevated railway structure over the public streets of this city without a substantial compliance with the city ordinances. A car not containing the proper license posted conspicuously therein, in accordance with the ordinance, can, in my opinion, be denied the right of use over the city's streets, and for the accomplishment of this end, whatever force is required may be employed. I suggest that a notice be served on the Lake Street Elevated

Railroad Company that on and after five days from the date of said notice it will not be permitted to operate or in any way use any car not containing a license conspicuously posted therein, in accordance with the ordinance, and that the Chief of Police be instructed to issue orders to prevent the use of any car not containing such license so posted therein. I suggest this summary action, because no penalty is fixed for the breach of the ordinance above referred to and no other effective means are available.

Very respectfully yours,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 13, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I acknowledge receipt of your letter of December 7, 1903, with stated enclosure, asking this department for an opinion as to whether or not you have the right, under the recent order of the City Council or the ordinances of the city, to compel the removal of all advertising signs from the stations of the elevated railroads.

I assume the order you refer to is that of October 12, 1903, page 1254 of council proceedings.

On June 20, 1902, this department rendered an opinion to a judiciary sub-committee, council proceedings of September 29, 1902, page 1136, to the effect that grants from the city to elevated railroad companies contemplate that the companies may erect structures on the streets for the carriage of passengers; that under its charter powers, the city may prevent the use of its streets for signs and advertisements; that the City Council has authority to regulate and prohibit the display of all signs or advertisements upon the structures of elevated railroads erected on the streets, except such signs or advertisements as may be incidental to the public use of the railroads.

Practically, all of these stations of the elevated railroads are situate on and over the public highways, and as to those

stations, the city has the power to remove therefrom all unauthorized signs.

However, a portion of the right of way of one or more of these elevated railroads is over private property, acquired by condemnation proceedings, or by deed of conveyance. Such rights as were acquired by judgments of condemnation do not include the ownership of the fee of the land, nor the right to use it for any other purpose than that for which it is condemned. (*Lockie v. Mutual Union Tel. Co.*, 103 Ill. 402.)

Whether these companies are controlled by the Horse and Dummy Act, or the Railroad and Warehouse Act, their powers are limited to the grants there made, and such powers are simply those necessary for the operation of the roads. Whether a corporation is created by a general, or special law, it may exercise only those powers which are expressly given to it, and such other powers as are necessary to carry the express powers into effect. (*People v. Pullman Palace Car Co.*, 175 Ill. 125; Dillon on Mun. Corporations, Section 443.)

The maintenance of advertising signs on these stations is wholly foreign to the business for which the corporations were formed, and cannot be an aid to any legitimate purposes of such companies. Therefore, such right is not impliedly authorized.

Such absence of power cannot be supplied even by city ordinance. It has been held that an ordinance can confer upon a railroad company no power; the company must look to its charter for power, and if it is not thus conferred, it cannot be supplied by any action of the Common Council of a city, but alone by the General Assembly. (*City of Chicago v. Evans et al.*, 24 Ill. 56.)

I am of the opinion that the maintenance of advertising signs on the station of an elevated railroad company, whether such station is upon public or private property, is in violation of law and beyond the power conferred upon companies by statute.

Where the acts of a corporation are outside of the purposes of its creation, they are *ultra vires* and void, and usu-

ally, the State is the only party to complain that a corporation has exceeded its power.

However, I am of the opinion that the city has the power to pass and enforce an ordinance prohibiting the maintenance of advertising signs on any elevated railroad station or platform, whether or not it is on public or private property. There is no ordinance in force that authorizes you to remove signs from stations or platforms, or parts thereof, which are on private property; but I am of the opinion that an ordinance with that end in view would be valid.

Yours very truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 14, 1904,

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

Replying to your letter dated September 25, 1903, asking whether or not the commission of a special patrolman is revoked when there is a change in the head of the department, I beg leave to advise you that Section 1491 of the Revised Code authorizes the General Superintendent of Police to appoint special patrolmen to do special duty, and by Section 1492 thereof, you are given authority to revoke such commission at any time, without assigning any cause therefor.

When an officer or board of officers has the power to appoint certain officers to hold office during the pleasure of the appointing power, a change of appointing officers, or in the personnel of the board, does not affect the tenure of the appointee.

"An appointment unlimited as to its terms continues in force until revoked, or the authority by which it was made ceases to exist. The death or removal of members of a particular board who are vested with appointing power, their places being filled by others, does not annul the appointments already made, because the board continues to exist, with their

power to make or revoke appointments, although its members have changed."

State ex rel Carter v. Board of Public Lands and Buildings, 7 Neb. 49; 23 A. & E. Enc. of Law (Second Edition) 418.

While such appointments are for no definite period of time, and the tenure is subject to the pleasure of the Superintendent of Police, I am of the opinion that Justice Fitzgerald was in error when he held that the tenure of such an officer, appointed by a former Superintendent of Police, was annulled on the removal of the appointing officer. So long as the office of Superintendent of Police continues to exist, these appointments, under the present ordinances, will continue in force until revoked by the superintendent, and the commissions need not be renewed when a change takes place in the officer of General Superintendent of Police.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

JANUARY 14, 1904,

ARTHUR J. EDUX, ESQ., President Police Pension Board.

Dear Sir:

I have your communication of to-day requesting an opinion as to whether the term "injury", used in Section 6 of the Police Pension Law, means a clearly perceptible physical injury or the contraction of a fatal disease.

Section 6 of an act approved May 16, 1903, entitled "An Act to amend Sections 1, 2, 3, 4, 6, 9, 10 and 11 of an Act entitled 'An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns,' approved April 29, 1887, in force July 1, 1887, as amended by an Act approved April 24, 1899, in force July 1, 1899, as amended by an Act approved May 11, 1901, in force July 1, 1901," provides:

"Whenever any member of the police force of such city,

village or town shall lose his life while in the performance of his duty, or receive injuries from which he shall thereafter die, leaving a widow, or child or children under the age of sixteen years, then upon satisfactory proof of such facts made to it, such board shall order and direct that a yearly pension of one-half the salary received by said member, not to exceed \$900 and the minimum not less than \$600 per year, shall be paid to such widow during her life, or if no widow, then to such child or children until they shall be sixteen years of age: *Provided*, if such widow, child or children shall marry, then such person so marrying shall thereafter receive no further pension from said fund: *And, provided further*, that whenever any member of the police force of such city, village or town, has been retired after twenty years' service, or physically disabled, shall then marry, such wife or child or children of such marriage shall, after his death, receive no pension from said fund. Whenever any member of a police force shall die after ten years' service therein, and while still in the service of such city, village or town, as such policeman, leaving a widow or child or children under the age of sixteen years, then upon satisfactory proof of such facts made to it, said board shall order and direct that a pension of one-half the salary, not exceeding the sum of \$900, shall be paid to such widow, or if there be no widow, then to such child or children until they shall be sixteen years of age, said pension to cease upon marriage, as provided above."

It seems to me to be clearly the intention of this section of the act that the injuries referred to shall be a physical hurt received by the member and causing his death, and not the contracting of a disease from which death results; and this view is strengthened by the fact that the provision in question occurs in the same section with the provision for the payment of a pension to a member who shall die after ten years' service. Were the term "injury" to include any disease contracted while in the service, the result would be to practically destroy the effect of the provision providing for a pension after ten years' service. In addition, were the term in question to be construed to include any diseases contracted while in the service, it is apparent, I think to anyone, and must have

been so to the framers of this section, that it would be a physical impossibility for any examining physician appointed by the board to determine whether the diseases contracted, and which resulted in death, were contracted while in the performance of his duty or not. Police officers on furloughs, vacations, temporarily suspended from duty and at home might readily contract diseases from which death would result, and in such cases it would be absolutely impossible for any one to determine whether the contraction of the diseases had occurred while on duty or during the periods mentioned in the above examples. It is safe, I think, to say that the legislature would never have contemplated such an impossible act as the determination of the exact time of contracting a disease, the symptoms of which might not manifest themselves for a considerable period of time.

The act in question is not a form of life insurance for the benefit of policemen, and the provisions of Section 6 in question more nearly partake of the features of accident insurance, the beneficiary only receiving the pension in the case of injuries for which an accident insurance company would pay its beneficiaries for injuries under its policies.

While it may be true that the calling of a member of the police force subjects policemen to greater liability in contracting diseases, by reason of exposure, etc., than other walks in life, it is to be presumed that the legislature knew this fact and did not intend to open the treasury of the pension board to the innumerable claims which would necessarily arise were death resulting from disease to entitle a policeman's family to a pension.

The plain intent of this portion of the section, I think, is that widows and children of policemen dying from diseases contracted in the service before the expiration of ten years' service on the force, are not entitled to a pension.

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

JANUARY 20, 1904.

WILLIAM E. DEVER, Esq., Alderman, 17th Ward.

Dear Sir:

I have your communication of the 5th inst., requesting an investigation of the right of certain members of the police force injured in the Haymarket riot to be paid a pension from the Police Pension Fund. Your communication also states that you are informed that the Police Pension Board, on the advice of this department, has heretofore refused to pay these policemen the pensions which they have been drawing for about fifteen years.

This department, so far as I am aware, has rendered no opinion to the Police Pension Board relating in any manner to the cases of persons on the police force who were injured in the Haymarket riot. The right to employ a police pensioner upon the police force by means whereof such pensioner receives pay in addition to his pension, has been denied in the opinion of a former Corporation Counsel. I think that the converse of this proposition, namely, that a person drawing pay upon the police force cannot receive a pension is equally true.

In my opinion, the law contemplates the retirement of an officer from the service or the severance of his connection with said force before a pension can be claimed. I think it equally against the spirit and the letter of the statute that a person receiving compensation as a police officer should also receive a pension from the police pension fund.

While I appreciate to the fullest extent the hardship of the position occupied by these faithful members of the police department, I am unable to devise or suggest any legal means for a continuance of their pensions in the present instance, other than the insertion in the next appropriation ordinance of an item for the payment of their services.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 21, 1904.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

In regard to the disposition of the funds in the sundry improvements originally contracted for by Walter Fleming, pursuant to special assessment proceedings, I am of the following opinion:

There are two general classes of cases involved:

First. Those in which contracts were originally awarded to Fleming. Of these some were completed, and others only partially completed, by him.

Second. Those where the contracts were originally awarded to Fleming, but on which he defaulted, thereby necessitating the reletting of said contracts to other contractors to complete the work.

The two classes of contracts above defined are entirely independent of each other, and the funds in each should be kept-separate and distinct. In other words, the contracts which have been relet and completed by other contractors occupy the same status in respect to the Fleming fund as original contracts, and the fund, out of which the liabilities on said "relet" contracts are to be paid, are not subject (unless there should be a surplus after the payment of all the obligations), to any of the claims against the Fleming fund, either for material, labor, vouchers or bonds. And likewise the funds apportioned for the payment of Fleming contracts completed or partially completed, cannot be drawn on or applied in any manner to the payment of claims against the funds apportioned for the payment of the "relet" contracts. For instance, if any vouchers or bonds in respect to improvements completed or partially completed by Fleming have been delivered to Fleming before lien notices were served, a sufficient portion of the assessment to pay said vouchers or bonds must be kept in the Walter Fleming account, and not used in respect to the fund for the contracts relet.

In apportioning a fund between that part of an improvement *partially* completed by Fleming, and the balance of said improvement finished by relet contracts, the amount of the cost of the work actually performed by Fleming should be de-

ducted from the whole improvement fund, and applied to the Fleming claims, and the rest of the fund used for claims under the contracts which were relet. As previously stated, these two funds are to be kept separate and treated as independent of each other.

We will now consider the disposition of the funds in the first class above defined, namely, the improvements completed and partially completed by Fleming.

The claims against this fund are as follows: Labor, material, voucher and bond claims.

In respect to labor claims where the proper lien notices have been filed, in accordance with the statute, before any payment of money and the delivery of any bonds or warrants due or to become due to Fleming, I am of the opinion that such claims should be paid first, in full if possible, or in other words, they should be given preference over all other claims against the Fleming fund. We are led to this conclusion by the terms of the contracts executed by said Fleming for the respective improvements, which, in each case, provide that the Board of Local Improvements may pay the laborers employed by the contractor out of the funds due the contractor, upon estimate of said board and that the Comptroller is authorized to ascertain the amounts due such laborers, without notice to such contractor, and that the amount which he thus finds due shall be final and conclusive against the contractor and charged against his account; said amount being payable out of the proceeds of the special assessment. This provision gives the labor claims priority even over vouchers and bonds which have been issued prior to the filing of any lien notices under the statute, for the reason that the owner of the voucher or bond is not an innocent purchaser for value holding said voucher or bond free from defenses which might be urged by the city against Fleming. On this point in the case of *National Bank of La Crosse v. Petterson*, 200 Ill. pp. 215-218, it was said:

“These bonds and vouchers were not negotiable and had no effect to invest the appellant with any right superior to that of the contractor to whom they were issued.”

Such vouchers or bond holders, therefore, stand in the

same position as Fleming and are bound by the terms of the above contract between Fleming and the city.

After the payment of the labor claims, I am of the opinion that vouchers or bonds held by Fleming's assignees, which were delivered *before the filing of any lien notices*, under the statute, should be paid next in order to said labor claims. And in my opinion the delivery of certificates to Fleming by the Comptroller, stating that vouchers were on deposit in the Comptroller's office, and would be paid on the proper endorsement of the certificate, is equivalent to a delivery of the vouchers referred to in said certificates. Any vouchers or bonds which have been issued to Fleming by the Board of Local Improvements, but, which have never been delivered to him (either by delivery of said vouchers or bonds, or by delivery of such certificates) should be cancelled, and the amount of each voucher or bond credited to the specific fund named therein.

After the payment of the labor, voucher and bond claims, as indicated, if there is any surplus remaining, I am of the opinion that it should be applied to the payment of the claims of the material men, who have filed proper lien notices in accordance with the statute.

In paying the above claims, it is my opinion that the funds in respect to each improvement should be kept separate and applied only to the claims against that particular improvement. I think that this is a correct construction of the statute, authorizing liens of this character, which provides as follows:

"Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor for a public improvement in this State, shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement: *Provided*, such person shall, before any payment or delivery thereof is made to such contractor, notify the officials of this State, county, township, city or municipality whose duty it is to pay such contractor, of his claim by a written notice and the full particulars thereof. It shall be the duty of such official so notified to withhold a sufficient amount to pay such claim until it is admitted, or by law estab-

lished, and thereupon to pay the amount thereof to such person and such payment shall be a credit on the contract price to be paid to such contractor."

Sec. 24, Chap. 82, on Liens, Hurd's Rev. Stat., p. 1154.

It will thus be seen that the statute grants a lien only on the money, bonds or warrants due or to become due such contractor *for such improvement*.

I am of the further opinion that the lien provided for attaches to any money held in reserve under the terms of a contract, to insure the completion thereof, subject, however, to the rights of the city to apply said reserves to the purposes stated in the original contract.

Under the statute no particular form of words is required for a lien notice given by a laborer or material man, but, in order for said notice to be effective, it must indicate the specific fund for which the labor or material was furnished.

Very respectfully,

FRANK JOHNSTON JR.,

Assistant Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 22, 1904.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

In reply to the report of Inspector Campbell, forwarded to me by you, with regard to the work done after midnight of January 20th by employes of the Chicago Union Traction Company, on Wells street, between Illinois and Michigan streets, I beg leave to say:

Section 1760 of the Revised Code of 1897 reads as follows:

"No railroad corporation or company operating a surface railroad shall hereafter erect any poles or string any wires thereon, along, upon or across any public street, alley, highway, or other public place in the City of Chicago, for the purpose of conveying an electric current to operate its railroad

cars, unless it has obtained permission and authority from the City Council of the City of Chicago for that purpose.”

Section 1902 provides:

“No person, firm or corporation shall erect, construct or put up any pole, line or wire, or electric conductor of any description whatever within the limits of the City of Chicago, without first having obtained a permit therefor, under a valid and existing ordinance, from the Commissioner of Public Works, which permit shall be countersigned by the Superintendent of City Telegraph, under a penalty of one hundred dollars for each and every offense; and each and every day any such telegraph pole, line or wire, or electric conductor, shall be continued and maintained after the first conviction shall constitute a new and separate offense.”

Section 1636 provides:

“Before a permit shall be granted to any corporation, company or individual, . . . to open ground in any street, . . . alley or public place for any purpose, an estimate of the cost of restoring the said street, . . . shall be made by the Commissioner of Public Works, and the applicant for such permit shall deposit the amount so ascertained with the City Comptroller, and the permit shall issue to the applicant only on the presentation of the Comptroller’s receipt for the same to the Commissioner.”

The provisions of these ordinances are undoubtedly familiar to your department, and in brief provide, that no person or corporation shall break the surface of the ground in any street for the erection of any trolley pole or string any trolley wire without a permit from the Commissioner of Public Works.

Permits have been issued to the receivers of the Union Traction Company, in a special form prepared by this department, for every piece of work which they have asked permission to do in the streets of Chicago, with two exceptions, as follows:

The receivers applied for leave to erect trolley poles and install overhead contact trolley wires on six streets of this city, including Lincoln avenue, Division street, Wells street, Clybourn avenue, Madison street and Blue Island avenue.

This department, in an opinion dated November 14, 1903, held that the receivers were not entitled to permits for such installations, and upon a hearing of the matter in the United States Circuit Court, before his honor, Judge Grosseup, the application of the receivers was denied as to all streets except parts of Lincoln avenue and Blue Island avenue, and as to those streets directions were given to the receivers to erect the trolley poles and install overhead contact wires without prejudice to the right of the city on the final hearing of the matter in the Federal Court to require said trolley lines to be taken down, the court declining to pass upon the question of the validity of the underlying ordinances on said streets until such final hearing.

It will be observed that the Wells street application was among those not granted. On the hearing of said case it was shown by the city that that portion of Wells street between Illinois and Michigan streets was "dead" track, the use of which had been abandoned, and that it was not then being operated by either electricity or cable and never had been operated by either power. It is a very significant fact that this unlawful and surreptitious effort to install this electric equipment is directed to this particular portion of Wells street. Wells street is one of the most important lines, from the standpoint of the Union Traction Company, and their system is particularly embarrassed by this gap of one block on said street. Special means should be taken to see that the present situation on Wells street is in no way changed. The wires which have thus been surreptitiously installed on said street must not be allowed to be connected with other wires, and no further work must be permitted to be done. Please make such details as in your judgment may be necessary to prevent the completion of the work already done. So soon as all the facts with regard to the matter can be gathered together, they will be submitted to Judge Grosseup, with the request, on the part of the city, that the agents of the receivers who have done these unlawful acts be ordered to undo them. Please see that the police officers understand that the receivers of the Union Traction Company must exhibit authority for their acts, except in the two instances above referred

to and hereafter more fully stated. They must exhibit permits for all work not authorized by an order of court. The only order of court that has been entered authorizes the erection of trolley poles and the installation of overhead contact wires on Blue Island avenue, between West Twelfth street and Halsted street; on Lincoln avenue, between Wrightwood avenue and Fullerton avenue, and on Lincoln avenue, between Webster avenue and Garfield avenue.

Very respectfully yours,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 22, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have the communication of Mr. John H. Bell transmitted by you to this department with reference to the inadequate number of cars operated by the Lake Street Elevated Railroad Company upon the spur maintained upon Market street from Lake street to Madison street in this city.

The Lake Street Elevated Railroad Company constructed and is now operating and maintaining its elevated structure on Market street under an ordinance passed May 15, 1893, and an ordinance amending Section 1 of the foregoing passed May 22, 1893. The ordinances grant the right to the company to operate:

“A branch line beginning on the main line of road at Market and Lake streets, running thence in a southerly direction along Market street to the south line of Madison street; provided said line of road upon Market street shall not occupy with its posts more than 22 feet of said street on such part of such street as may be designated by the Mayor and Commissioner of Public Works and accepted by said railroad company, and no more than two main tracks shall be laid upon said Market street; and provided in leaving its main line of road upon Lake street, it may make necessary curves to build the line of road hereby authorized upon Market street.”

Special Ordinances, 1898, Vol. 2, p. 901.

Section 5 provides, among other things, that:

“The rights, powers and privileges hereby granted are upon the express condition that all freight trains and other rolling stock of surface steam railroads shall be absolutely excluded from said elevated railroad, its tracks and right of way, and that it shall be used for moving its general passenger trains only and for accommodating and handling passenger traffic and the mails exclusively, to which end said company shall cause its trains to be regularly and systematically moved at such intervals as shall be necessary to accommodate the public, and the number of all such trains and the frequency with which they are moved shall be increased as rapidly as the demands of the public render necessary and the increase of traffic warrant.”

Under the latter section of the ordinance referred to, I am of the opinion that the city authorities have ample power to compel this railroad company to furnish an adequate number of cars to accommodate the passenger traffic upon this branch, thereby relieving any such crowding or congestion of passengers as is mentioned in the communication from Mr. Bell.

I am of the opinion that the city also has the power to pass an ordinance under its general police power either to compel the company to keep closed the gates upon the platforms of its cars or to provide its cars with other and more suitable gates, if the present ones are insufficient for the purposes of protecting the safety of the passengers carried upon the road.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 22, 1904.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

I beg leave to acknowledge receipt of your favor of the 8th

ult., asking for a construction of "the lien law as it affects the Comptroller in the following particulars:

"1. When must notice of a lien be filed with the Comptroller in order to be operative?

"2. Is there any particular form of notice? Does it have to be under seal?

"3. How long a time is a lien operative?

"4. Does a lien operate against a reserve held to insure the proper completion of a contract?"

And requesting "any further information respecting this law which may be necessary for the guidance of the paying teller of this office."

In reply I beg leave to say that I presume the lien law referred to is Section 24, Chapter 82 of Liens, page 1154, Hurd's Revised Statutes, which is as follows:

"Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor for a public improvement in this State, shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement; provided such person shall, before any payment or delivery thereof is made to such contractor, notify the officials of this State, county, township, city or municipality whose duty it is to pay such contractor, of his claim by a written notice and the full particulars thereof. It shall be the duty of such officials so notified to withhold a sufficient amount to pay such claim until it is admitted, or by law established, and thereupon to pay the amount thereof to such person and such payment shall be a credit on the contract price to be paid to such contractor."

Answering your inquiries in the order stated, I am of the opinion:

1. In order for a lien notice to be effective as against the Comptroller, under said statute, it must be filed with the Comptroller before payment or delivery to the contractor by the Comptroller of the money, bonds or warrants due or to become due said contractor. In other words, it must be filed while the money, bonds or warrants due or to become due the contractor, remain in the hands of the Comptroller. If a delivery or payment has been made by the Comptroller of

such money, bonds or warrants before the lien notice is filed, said notice is ineffective for the purposes provided for in the statute; and such payment or delivery by the Comptroller does not create any liability against the city or the Comptroller.

2. No particular form of notice is required. It should, however, clearly indicate the particular improvement for which the material, apparatus, fixtures, machinery or labor was furnished, as the lien only attaches to the money, bonds or warrants due or to become due the contractor for such improvement. It is not necessary for the notice to be under seal.

3. The lien created by an effective notice continues in force until the claim of the party filing said notice is, in the words of the statute, "admitted, or by law established."

4. I am of the opinion that a lien created by an effective notice attaches to the reserve held to insure the proper completion of a contract, subject, however, to the rights of the city to apply said reserves to the purposes stated in the original contract.

I have no further suggestions to offer for your guidance in the above matter.

Very truly yours,

FRANK JOHNSTON JR.,

Assistant Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 23, 1904.

MR. C. D. HILL, Engineer, Board of Local Improvements.

Dear Sir:

In answer to your communication of recent date, in which you state that "plans are being prepared for the 95th street sewer system, which will drain about five thousand acres lying south of 87th street and east of Halsted street. The outlet of this sewer will be at 95th street and the Calumet river; that on account of the low level of the ground, it will be necessary to install a pumping station similar to that provided for in the Jackson Park avenue sewer system; that the city has

already purchased a large tract of land at the corner of 96th street and Erie avenue, where it is proposed to build this pumping station; that this land is larger than is needed for this purpose and it is proposed by the electrical department to build on the same tract an electric lighting station. By consolidating the two stations and having a common boiler-room, the city will be enabled to save between \$5,000 and \$10,000 each year on the cost of maintenance; that the capitalization of this saving at a reasonable rate of interest would more than pay for the pumping station; that it is proposed to have the joint boiler-room, containing the boilers located between the engine-room, in which are installed the sewerage pumps, and the dynamo-room, in which are to be installed the electric generators; that the portion of the building and machinery that is to be used for electric lighting is to be paid for out of the general appropriation for the electrical department," and in which communication you request advice "as to how far you should proceed in the ordinance for the construction of this pumping station by special assessment, and whether or not it would be proper to include any of the building or boilers that are to be used for the electric lighting station and to offset this with an item of public benefits levied against the City of Chicago, or whether it would be safe to omit from the special assessment ordinance any reference to the joint boiler-room and to provide for the same by some other ordinance or appropriation," I beg leave to say, as I understand the facts from your communication and from conversations with you, the estimated cost of this improvement will be nearly a million dollars; that the proper share of the cost of the joint boiler-room to be paid by this special assessment will be ten thousand dollars or less; that if the ordinance contained provisions for this boiler-room, it would appear that the size would be largely in excess of the needs of the pumping station. Therefore, it might be urged by objecting property owners in this proposed assessment proceeding:

First. That the improvement was unreasonable in providing for a boiler-room larger than is necessary for the needs of the sewerage pumping station.

Second. That a part of the special assessment proceeding was levied to defray the cost of constructing a boiler-room to be used for some other purpose than that proposed in the ordinance, to-wit, for an electric lighting plant.

In view of these facts, it is my opinion that it would be safer not to provide for the construction of this boiler-room in your proposed ordinance or to provide for any of the cost of the construction of this boiler-room in your proposed ordinance, but to provide in your ordinance that the pumps be operated by steam boilers in a boiler-room to be built and paid for by an appropriation already made for that purpose, to-wit, an appropriation for the establishment of an electric lighting station on Erie avenue, south of 95th street, the appropriation ordinance also imposing the duty of furnishing said steam for said proposed sewerage pumping station. Before said proceedings are commenced for said proposed sewer system, it would be necessary to have the said appropriation and ordinance passed in reference to the construction of said boiler-room as above suggested, for the Supreme Court has held that you cannot estimate benefits based on the probable action of the municipality.

Hutt v. City of Chicago, 132 Ill. 352.

In a conversation with me you requested an opinion as to whether or not it would be proper to show on the drawings accompanying the ordinance, the construction of the boiler-room and how the proposed sewerage station would be operated by steam from this boiler-room. I can see no objection to this course.

Very respectfully,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 23, 1904.

MR. WINFIELD P. DUNN, Alderman, 25th Ward.

Dear Sir:

As Chairman of the Sub-committee of the Judiciary Com-

mittee, you requested on the 8th inst., the preparation of an ordinance prohibiting the acceptance, etc., of passes, etc., and in your favor of the 9th inst., you suggested modification of the resolution introduced by you in the council. I submit herewith a draft of an ordinance covering the subject desired, which I think can be applied to every officer or employe of the city.

The power of the City Council to pass this ordinance and compel compliance therewith is derived, in my opinion, from the following sections of the statute:

Chapter 24. Article 1: Sections 5, 7, and 10. Article 2: Sections 20, 23 and 27. Article 3: Sections 29, 32, 33, 34 and 35, and more particularly I refer to Chapter 24, Article 5, Section 1, Clause 71, enumerating the powers of the City Council as follows:

“To provide by ordinance in regard to the relation between all the officers and employes of the corporation in respect to each other, the corporation and the people.”

And also Clause 96, giving power to pass ordinances and prescribe penalties for the purposes of carrying the prescribed powers into effect.

Article 6, Section 74, provides, among other things:

“The City Council may, by ordinance not inconsistent with the provisions of this act, prescribe the duties and define the powers of such officers.”

The word “such officers” in the section just quoted plainly refer to Sections 72 and 73 of Article 6. Section 72 provides:

“There shall be elected in all cities organized under this act, the following officers, viz.: the Mayor, a City Council, a City Clerk, City Attorney and a City Treasurer.”

Section 73 provides that the council, by a two-thirds vote may authorize the election of or appointment by the Mayor, of a Corporation Counsel, Comptroller and certain other officers therein named as they may deem expedient.

While the decisions are not harmonious it has been held that the power to remove a corporate officer from his office is one of the common law incidents of all municipal or other corporations.

Richards v. Clarksburg, 30 W. Va. 491;

State ex rel. v. Walbridge, 119 Mo. 383.

Legislation providing for the removal of officers for collecting political assessments from persons in the employ of the city, etc., has been upheld as an exercise of the power to prohibit acts of officers or employes incompatible with the proper discharge of their duties, or which impair the efficiency or tend to demoralize the public service.

United States v. Curtis, 12 Fed. R. 824.

See also *State ex rel. v. Common Council*, 90 Wis. 612;

People ex rel. v. French et al., 60 How. Pr. 377;

People ex rel. v. Johnson et al., 10 N. Y. St. Rep. 404; (Affd. 12 N. Y. Weekly Digest, 468).

There can be little doubt that an ordinance forbidding any one serving the city to ask or accept passes or gratuities is constitutional and reasonable municipal legislation, and relates to the well ordering of the city, and its relations to its officers and employes.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 28, 1904.

MR. WM. MAJOR, Chairman Finance Committee of the City Council.

Dear Sir:

In answer to the recent request of your committee as made by the secretary of your committee, for an opinion "as to the legality of the city issuing special assessment rebates upon certificates of payment issued by the County Clerk and upon duplicate receipts," and as to the legality of the City Council ordering the payment of rebates upon certificates of payment and duplicate receipts, I beg leave to reply as follows:

In my opinion the purpose of such certificates or duplicate receipts is to ascertain the name of the person who paid

the assessment upon which a rebate is due. Upon ascertaining that fact it devolves upon the proper department of the city to issue the necessary voucher for such payment, provided it is a case where the city should pay such rebate. Upon the forwarding of said voucher to the Comptroller it becomes the duty of the Comptroller to issue a warrant for that amount payable to the person indicated in said voucher. The question as to who should receive that particular warrant is a matter of identification which rests with the Comptroller. In other words, it is the duty of the Comptroller to deliver said warrant to the person named therein, or his assignee, upon proper identification. In my opinion it is not necessary for the City Council to prescribe the method of identification, unless specially requested to do so by the Comptroller.

Respectfully submitted,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 28, 1904.

MR. EDWARD M. LAHIEFF, City Collector.

Dear Sir:

There has been transmitted to this department for an opinion a communication from Edwin J. Randall, President of the Garfield Park Protective Association, in which are incorporated several questions of law relative to the issuance of licenses to dram shop keepers within a certain district of the old Town of Cicero between Thirty-ninth street, North avenue and Forty-eighth and Fortieth avenues:

1. Is a saloon keeper in this district required to make a new application for a license at the end of each fiscal year?

Section 2, Chapter 5, Revised Ordinances of the Town of Cicero concerning dram shops, provides:

“No application for a license to sell or give away fermented, malt, vinous or intoxicating liquors shall be granted unless the same shall be accompanied with a petition praying that a license to sell liquors be issued to the applicant, and

stating the exact locality where applicant proposes to sell liquor and signed by a majority of the legal voters residing within one-half mile of the proposed place where liquors are to be sold."

Section 1169, Revised Code of Chicago, 1897, provides:

"No license shall be granted for a longer period than one year, and every license, except saloon licenses, shall expire on the last day of April next following. Every license shall be signed by the Mayor and countersigned by the clerk under the corporate seal."

Section 1178 of the liquor ordinance of the city provides:

"The license year from and after the passage of this ordinance is hereby divided into periods as follows: From May first to August thirtieth, inclusive, shall be known as the first period; from August thirty-first to December thirtieth, inclusive, shall be known as the second period; from December thirty-first to April thirtieth, inclusive, shall be known as the third period. Licenses may be issued for the full license year or for the unexpired portion thereof, or for any period of the unexpired portion thereof; and the fee payable therefor shall be five hundred dollars in advance for the full license year, or \$166.67 in advance for each period: Provided, that if any license shall issue for the unexpired portion of the license year or for the unexpired portion of any period, the fee to be paid therefor shall bear the same ratio to the sum required for the whole year that the number of days in said unexpired portion bears to the whole number of days in the year; and provided further, that no license shall extend beyond the thirtieth day of April next following its issuance."

The provisions of Section 5 of the ordinance of the old Town of Cicero are controlling upon dram shop licenses issued by the Mayor under the provisions of Section 1188 of the Revised Code of 1897, which provides as follows:

"When any territory has heretofore or shall hereafter be annexed to the City of Chicago, and within such territory so annexed, or any part thereof, the issuing of dram shop licenses was prohibited or regulated by ordinance of the city, village or incorporated town of which such territory was before such annexation a part, then in such case no license shall

be issued by the Mayor to keep a dram shop within any portion of the territory so annexed wherein the issuing of dram shop licenses was prohibited before such annexation by the corporate authorities of the municipality of which it was formerly a part; or if, within any such territory so annexed, licenses to keep dramshops were prohibited unless a petition therefor was filed, signed by a majority of the legal voters residing within one-half mile of the proposed location, then in such case the Mayor shall not issue a license to keep a dram shop within such territory, unless a petition shall be filed with him signed by a majority of the legal voters residing within one-half mile of the proposed location."

There is no provision either in the ordinances of the Town of Cicero or those of the City of Chicago for a renewal of expired licenses, and it appears to me to have been clearly the intention of the framers of the dram shop ordinances of both of those municipalities that a license having expired was *functus officio* and could not be renewed or revived, and to enable the dram shop keeper to continue his business application should be made for a new original license, accompanied by a compliance with whatever conditions precedent the law made necessary.

In the early case of *Munsell v. Temple*, 3 Gil, 93, the doctrine is laid down which has long prevailed in England and has generally been adopted by the courts of this country:

"The policy of our legislature has always been to restrain the selling of spirituous liquors by retail. The section referred to is conceived in this spirit and prohibits, in language not to be misunderstood, the County Commissioners from issuing licenses unless the conditions prescribed by law had been previously complied with."

I am of the opinion that a new, original application must be made by a person desiring to obtain a license to keep a dram shop before a license can be properly issued to him by the municipal authorities.

2. If such an application were not made, would the license fee be accepted?

I apprehend that the writer intends to ask whether in

case an application were not made a license fee could be legally accepted, and I am of the opinion that where the legal prerequisites for the issuance of a license are not complied with, the authorities would have no right to accept a fee for a license which could not be lawfully issued.

3. Under Section 4 (same ordinance) a license is "not transferable." Can a transferee under the ordinance do business without first obtaining a petition, etc.?

Under the provision of the ordinance in question the inquiry resolves itself not as to whether a transferee can do business without first having performed certain conditions, but whether there can legally be a transfer of the privileges conferred by the license. The ordinance of the Town of Cicero itself indicates that this question must be resolved against the transfer of a license by expressly prohibiting such transfer. Section 4 of Chapter 43 of the act concerning dram shops, passed March 30, 1874, expressly provides that licenses shall not be transferable. Although the ordinances of the City of Chicago make provision for the transfer of licenses, these ordinances are not controlling in the territory in question because of the provisions of Section 18 of an act to provide for annexation of cities, etc., in force April 25, 1899, which provides:

"There shall be continued in full force and effect all ordinances of any municipality the whole or any part of which is annexed to another city, incorporated town or village whereby the licensing of dram shops is prohibited or regulated within said city, village or incorporated town or any part of thereof, unless such ordinances shall have been changed by popular vote."

In addition to the distinct statutory prohibition against transfers, the general policy of the law forbids them on the ground that a personal trust is imposed in the licensee by the authorities which cannot be assigned. In *Munsell v. Temple*, *supra*, the court say:

"In requiring less than twenty-five dollars the County Commissioners must have acted upon the idea that licenses are transferable and that they might be granted for the residue of a term. But this is a mistake. Licenses attach to the

person and cannot be used by others, even with the consent of the court, for what remains of the annual term for which they have been originally given."

The granting of a license is made conditional upon the ascertainment by the licensing officer of certain facts, the suitability of the premises, the character of the applicant, etc., and to permit a transferee to obtain a license by mere assignment, without any examination as to his individual character or fitness, would largely deprive the licensing officer of his proper powers in this respect. As is said in *Queen v. Recorder of Dublin*, 11 Irish Reports Law, p. 416:

"A person whose character would scarcely bear the searching public inquiry incident to an original application might procure a friend, whose character would better bear such an investigation, to obtain an original license and then obtain a transfer from him, complying with the more easily satisfied requirements of the law applicable to that case."

The English and Irish dram shop acts, upon which our acts are framed, expressly provide for a transfer in certain cases, requiring conditions fully as exacting as those required by an original application. Our legislature in failing to provide for any method of transfer would seem clearly to have prohibited it even though they had not done so by express enactment.

I am therefore of the opinion that licenses issued for dram shops in the district above referred to cannot be transferred.

4. If, as a fact, dram shops have existed in the past without complying with those ordinances (such compliance being not of record) can the city authority issue a license in the future, or accept the license fee without their first complying with said ordinances?

Having answered the latter part of this inquiry with reference to the authority of the city to issue a license to dramshop keepers who have not complied with the ordinances in the past, it is plain that no license can be issued without a previous full compliance with the legal prerequisite conditions. The fact that a dramshop keeper has obtained licenses in the past without such compliance would in no manner entitle him *ipso facto* to a license in the future. In fact, his non-compli-

ance in the past might constitute a valid reason for refusing him a license in the future.

5. Will the fact of a written protest against granting licenses on application without proper petition having been filed with the Mayor, now on record, be considered when "applications" for renewals of expired licenses are requested?

This is a question of policy and departmental procedure which should more properly be addressed to the licensing officer than to this department.

6. As a matter of law, does not a license expire finally and absolutely of its own volition on April 30th each year?

As indicated above, I am of the opinion that each license does expire annually upon April 30th, and that upon the dram-shop keeper desiring to continue his business, it becomes necessary for him to make a new, original application accompanied by the petition of the necessary number of voters in the vicinity. The character of a neighborhood changes remarkably from time to time, and the residents of a district might consent to the location of a saloon therein at one time and a year or more hence would be entirely unwilling to countenance the maintenance of a dram shop. The applicant might have proved entirely unsuitable in character, and the conduct of the saloon might have shown the residents the impropriety of allowing a future continuance of the business. Then, too, it may be presumed that in signing the petition, the residents looked to the terms of the license and the fact that it would expire annually, and, being aware that they were signing for a period of one year, signed the petition when they would not have done so had it been understood that the license was to be in force for a longer period. The power of exercising discretion in the matter of allowing a saloon to open in this case is divided between the legal voters within one-half mile of the proposed saloon and the licensing officer, and the consent of both are necessary. I think that it was not the policy of the legislative body that the hands of succeeding voters of the district should be tied by the consent of one body of voters, but that each year the legal voters of the one-half mile district should have the option of consenting to or with-

holding their consent from the location of a saloon in their neighborhood.

In conclusion, therefore, I am of the opinion that a new application and petition are required by one desiring to open a saloon in the district in question, and that in this district saloon licenses are not transferable.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 30, 1904.

ARTHUR R. REYNOLDS, M. D., Commissioner of Health.

Dear Sir:

I acknowledge the receipt of your letter of the 26th inst. requesting my opinion as to the power of the city to maintain a municipal plant for the production of diphtheria antitoxin and vaccine lymph.

Ch. 24, Article V, Section 1, Clause 78, gives the city express power "to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." The plain language of this statutory provision makes superfluous the citation of any other authority in support of the power of the city to establish a municipal plant for the production of the remedial agencies referred to above. A reference, however, to an abundance of judicial authority may be found in my opinion of October 29, 1903, with regard to the power of the municipality to build a plant for the manufacture of crushed stone, and my opinion of November 23, 1903, concerning the power of the city to construct electric lighting plants.

In addition to the general question, you ask me specifically as follows:

Has the city the right (1) to distribute these remedies free of cost; (2) to sell them to all citizens at the practical cost of production; (3) to sell them to her own citizens at a profit;

(4) to sell them to those outside of the city limits either at a nominal price or at a profit.

In the case of *Wagner v. Rock Island*, 146 Ill. 139, the Supreme Court of this State, following the settled doctrine universally recognized in this country, so far as I know, held that in the business of supplying water to its inhabitants the city was exercising a proprietary and not a governmental function, and that in so doing it had the right to sell water at a profit. The right under consideration is of a similar nature, and I have no doubt that the right exists to distribute these remedies free of cost wherever reasonably necessary for the suppression of disease. This answers the first three of the above questions in the affirmative. In a very recent case the Supreme Court of Wisconsin has decided that in exercising these proprietary functions a municipality is not confined to its territorial limits, but in doing this kind of business it may carry it on, when and where it is reasonably proper so to do, under much the same rules as those governing ordinary business corporations. (*Schneider v. City of Menasha*, 95 N. E. Rep. 94.) I therefore answer the last of the above questions also in the affirmative. I think, however, that the city would not have the right to distribute these remedies outside of its own municipality, gratuitously.

Very respectfully yours,

EDGAR B. TOLMAN,
Corporation Counsel.

FEBRUARY 2, 1904.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

Replying to your letter inquiring by what authority the C. R. I. & P. R. Co. is occupying Malta street, from 99th to 103d streets, I have to say that having made a very careful investigation in the matter I find that that company constructed a switch track connecting its main track south of 103d street with the main track of the now P. C. C. & St. L. R. R. Co. at a point north of 103d street some time about 1866; that when this switch track was constructed the land there had not been subdivided and there were no legal streets or

highways there; there was no subdivision of the land made until 1869; that the Board of Trustees of the Village of Washington Heights by a resolution adopted in July, 1885, recognized the right of the Rock Island Company to maintain its tracks at this place upon condition that the company would build at its own expense a certain sewer, and we believe from the evidence submitted to us that the sewer was built in compliance with the resolution.

We are of the opinion that under the circumstances the city cannot now successfully challenge the company's right to maintain its tracks there.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 2, 1904.

MR. J. C. PATTERSON, Alderman, 20th Ward.

Dear Sir:

Replying to your favor of January 29, requesting the opinion of this department on the validity of a proposed ordinance compelling steam and street railway companies to install semaphore signal systems, I beg leave to say that in my opinion the city has ample power, under its police powers, to compel both steam railroads and street railroads to install and maintain such signals, and that the draft submitted is in proper form.

Draft of proposed ordinance returned herewith.

Very truly yours,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 2, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Replying to your letter of December 22, with stated enclosure, asking whether or not the cutting of doorways through walls on each floor of the building known as numbers 3 and 4 Washington street, makes said structure one building, I beg leave to advise you that from a sketch prepared by the Building Commissioner and attached hereto, it appears that this building has a frontage of one hundred (100) feet and an average depth of ninety-five (95) feet, making the floor area substantially 9,500 square feet. The Commissioner informs me that the structure is made up of four buildings and that it is what is known as "ordinary" construction.

This building comes within Class I of the building ordinance, Section 209 of which requires *all* buildings of that class, of four or more stories in height, to be equipped with fire escapes.

Assuming that the cutting of doorways through the walls on each floor makes the structure one building, we are confronted with Section 145 of the building ordinance, which provides in substance that dividing walls shall be placed in buildings of Class I, of ordinary construction, if their floor area exceeds 9,000 square feet, and all doors and other openings in such walls shall have iron doors or shutters at each side of same, and the buildings so subdivided shall be treated as regards stairs and fire escapes the same as two or more separate buildings.

As this building is within Class I, and is of ordinary construction, and has a floor area exceeding 9,000 square feet, I am of the opinion it is governed by said Section 145 and should be treated, in regard to stairs and fire escapes, as at least two separate buildings.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 3, 1904.

JOHN R. CAVERLY, ESQ., Police Magistrate, Harrison Street.

Dear Sir:

I have your favor of November 18, 1903, in which you request this department to "inform police magistrates whether jurors who are summoned in city cases and excused by counsel without serving, are entitled to jurors' fees."

Replying thereto, I beg leave to say that the Appellate Court, in a recent case, has said that "a talesman who obeys a summons is as much under the order of the court, and is as truly a juror as is a juror who is drawn in a regular panel, and although not sworn in a case on trial, is entitled to his pay as clearly as if he were in the regular panel." (*Moseley v. Turner*, 95 Ill. App. 215.)

It will thus be seen that whether a juror, who has been regularly summoned as such, actually serves in a case or not is immaterial so far as his being entitled to pay is concerned.

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 5, 1904.

MR. JOHN C. SCHUBERT, Chief Smoke Inspector.

Dear Sir:

I acknowledge your letter of December 10, asking whether or not the city may bring suit against the Board of Education or its members for a violation of a city ordinance. I assume you have in mind the "Smoke Ordinance."

By Section 10 of the ordinance it is provided that the emission of dense smoke from a chimney shall be deemed a public nuisance, and "the proprietor, lessee or agent of any building, factory, mill, works or other establishment having smoke stacks or chimneys who shall permit or allow dense smoke to issue or to be emitted from the smoke stack of . . . the chimney of any building, factory, mill, works or other establishment having smoke stacks or chimneys, . . .

shall be deemed and held guilty of creating a nuisance .

The title to school property is not in the Board of Education but in the City of Chicago, and I am of the opinion that the description of the persons in the above section is not broad enough to include the Board of Education or its members, notwithstanding the management of the school property is under the control of the board; but that fact does not relieve the Board of Education of its duty to manage the property under its control so as not to injure the property or person of another.

The decisions of this State hold that the unwholesome creation of smoke is a public nuisance *per se*. The character of the institution creating the nuisance affords no excuse, and any act which deprives the community of the right to live in the comfortable and free enjoyment of the air, free from unnecessary pollution is an indictable wrong. (*Secord v. People*, 121 Ill. 623.)

In the case of *Marshall Field & Co. et al. v. The City of Chicago*, 44 App. 411, which was a prosecution for the violation of the smoke ordinance, the court said:

"It is a matter of common knowledge that smoke becomes soot, which falls and blackens where it rests; that it is injurious to vegetation, to many kinds of goods, and annoying to people. This common knowledge is so generally diffused in Chicago that no jury could be without it."

In the case of *Harmon v. The City of Chicago*, 110 Ill. 406, which was a prosecution under the smoke ordinance, the court said:

"Certainly anything that is detrimental to certain classes of property and business in a populous city, and is a personal annoyance to the public at large within the city needs not to be defined by ordinance or lexicographer to be known to the common mind as a public nuisance. It is so *per se*."

"The usual remedy for public or common nuisance is by indictment, and this lies though a private action may also be maintainable in favor of an individual sustaining special and peculiar damages.

"A person charged with causing or continuing a public

nuisance may, *at common law*, be punished with fine or imprisonment or both.

“One indicted for a nuisance cannot defend on the ground that he acted as the agent of another in maintaining the nuisance, though this circumstance may serve to lessen the punishment.”

21 Am. & Eng. Ency. of Law (2d Ed.) 711-712.

Earp v. Lee et al., 71 Ill. 193:

I am of the opinion, therefore, that you may institute proceedings by indictment or information, under the common law, against the Board of Education and those of its members and employes participating in the maintenance of the nuisance.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 6, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your letter of February 3d you propound two questions, which may be briefly restated as follows:

First. Does Section 1185 of the Municipal Code (the “midnight closing” ordinance) apply to entertainments or public gatherings in a theater, hall or other public building, where the admission is by ticket and intoxicating liquors are sold?

Second. Does said section apply to private parties, balls, weddings or receptions given in such public halls or other public buildings, at which liquor is not sold, but is given away by the host under a permit as provided for in Section 116 of the Municipal Code?

Your letter presents to me questions of what the law *is*, and not of what the law ought to be. The peculiar language of the statutes and ordinances, as recently defined by the Supreme Court of Illinois, irresistibly compel conclusions which

would not naturally follow from the mere reading of the statutes and ordinances, which do not obtain in other States, and radically differ from the current ideas of the profession and public, prior to said decision.

In the case of *The People v. The Law and Order Club*, 203 Ill. 127, our Supreme Court quotes the statutory definition of a dram shop as follows: "A place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon."

The following provisions of Section 2 of the Dram Shop Act are quoted:

"Whoever not having a license to keep a dram shop, shall by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon . . . shall be fined," etc.

The court also quotes Section 7 as follows:

"All *places* where intoxicating liquors are sold in violation of this act, shall be taken, held and be declared to be common nuisances."

Reference is also made to the following words in Section 13:

"The giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be held to be an unlawful selling."

In the case to which I have referred it was held that a club where liquors are dispensed to members only, was a dram shop under our statutory definition, regardless of the fact that it was organized in good faith for social or literary purposes, and the service of liquor was a mere incident to its existence.

The court also says:

"The mere fact that such liquors are sold to its members and for a price sufficient only to pay their cost and the cost of serving them, can, under the statute, make no difference."

Applying the principles laid down by our Supreme Court in the case above referred to, to the first question which you have propounded, I see no escape from the conclusion that the dispensing of liquors in any manner or form, where payment is made, directly or indirectly, for the liquor thus dis-

pensed, at any ball, party, dance, concert or entertainment, or even the giving away of such liquor at such gathering, where such giving away is a shift or device to evade the provisions of the law, constitutes a sale, and the place where such liquor is so sold, or is *thus* given away, is a "dram shop" within the meaning of the statute, and requires a license under Section 1182 of the city ordinances (or, what is equivalent, a permit under Section 116) and a bond, as provided by the State Dram Shop Act.

The term "dram shops", it will be observed, has an artificial statutory meaning,—any place where spirituous liquors are sold in quantities less than one gallon. The words "saloon, bar room, tippling house," however, have no special artificial statutory meaning, but are to be taken in their ordinary signification. Thus, all saloons are "dram shops," but not all dram shops are saloons.

Section 116 of the Municipal Code, reads as follows:

"It shall not be lawful for any person or persons to sell or give away any spirituous, vinous, malt, or other intoxicating liquors, in any theater, hall, or other building in which public entertainments are given for gain, nor in any room or rooms connected with the same, without a special permit from the Mayor, under a penalty of not more than one hundred dollars for each and every violation of this section."

Section 1185 of said code, reads as follows:

"No person shall keep open any saloon, bar room or tippling house, during the night time between the hours of twelve o'clock midnight, and five o'clock a. m., under a penalty of not less than twenty dollars nor more than one hundred dollars for each offense."

I therefore conclude that Section 1185 of the Municipal Code (the "midnight closing" ordinance) does not have any application to entertainments of the class above referred to, or to any of the classes mentioned in Section 116. Said Section 1185 refers only to saloons, bar rooms and tippling houses, does not employ the term "dram shop" and clearly was not intended to refer to theaters, halls or buildings where public entertainments are given.

With regard, now, to your second question, concerning

the dispensing of wine or other liquor at a private party, ball, wedding or reception given in a public hall, where no charge is made for admission, or where the charge for admission is not intended to include payment, directly or indirectly, for "liquid refreshments", but the liquors are purchased at some other place, in advance, brought to the hall, and actually given away by the host as an act of hospitality or entertainment, I am of the opinion that such cases do not come within the dram-shop act or the provisions of either Sections 1182 or 1186 of the city ordinances.

The statute makes the distinction very clear that the giving away of intoxicating liquors, mentioned in Section 13 of the Dram Shop Act, is only such giving away as shall be a "shift or device to evade the provisions of this act." In cases, therefore, of private assemblages in public halls, only a permit under Section 116 is required and the provisions with regard to selling liquor without license and the closing of the place at midnight have no application. I am not unaware that the city ordinances, in legislating upon the subject of dram shops, make reference to the giving away of liquor, but I am of the opinion that these words should be construed in harmony with the statutory provision above referred to, and that the ordinances only regulate the giving away of liquor when such giving is employed as a shift or device to evade the provisions of the statute and ordinances in regard to the sale of liquor.

Perhaps it is not immaterial to your questions, to add that the law as thus interpreted has no relation to social gatherings in private houses where wine or other spirituous liquor is dispensed gratuitously by the host.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

FEBRUARY 6, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your verbal inquiry of this date, I beg leave to say:

I am of the opinion that you have power in proper cases, for any reason which may appeal to your official discretion to rescind your action in revoking a saloon license, and that the licensee is thereupon restored to his rights under his former license, without the necessity of a new petition of property owners in a local option district.

Speaking generally, the right to perform an official act requiring the exercise of official discretion, embraces the right to rescind the act, unless rights of third persons have intervened by reason of the changed status.

This conclusion is supported by the uniform practice of the courts in mandamus cases, ordering the rescision of such revocations. The courts never require new petitions or consents in such cases.

Whatever the courts can compel you to do by judicial order, you may in like manner do in proper cases, on your own motion.

Very respectfully submitted,

EDGAR B. TOLMAN,
Corporation Counsel.

FEBRUARY 8, 1904.

HON. LAWRENCE E. MCGANN, Comptroller.

Dear Sir:

In your favor of the 3d inst. you inquire as to the right of the City of Chicago, under its police powers, to impose a tax or license fee on all telegraph poles in the city limits.

I am of the opinion that, under the authorities, the city has such right, both under its police powers and under Chapter 134, Section 4, Hurd's Revised Statutes, 1901, relating to telegraph and telephone companies, which is in part as follows:

"No such company shall have the right to erect any poles, posts, piers, abutments, wires or other fixtures of their lines . . . upon any street, alley or other highway or public ground, within any incorporated city, town, or village, without the consent of the corporate authorities of such city, town or village, . . . The City Council or Board of Trustees of such city, town or village, as the case may be, shall have

power to direct any alteration in the location or erection of any such poles, posts, piers or abutments, and also in the height of the wires."

Section 12 of the same chapter also relates to the matter of poles and wires.

In *Taylor Borough v. Postal Telegraph Co.*, 202 Pa. St. 583, the court held that a borough may impose a reasonable license tax upon telegraph wires running through the borough, where it appears that the company owning the poles and wires was engaged in intrastate and interstate business, and that the reasonableness of the fee depended upon various elements which entered into it and which were the necessary or probable expenses incident to the issuing of the license and the probable expense of inspection, regulation and police supervision and the possible liability of the city for accidents caused by the negligent care of the poles and wires.

See also *City of Philadelphia v. Western Union Tel. Co.*, 89 Fed. 454; *City of Philadelphia v. Postal Tel. C. Co.*, 21 N. Y. Supp. 556; *City of Philadelphia v. Atlantic & P. T. Co.*, 102 Fed. 254.

In the case I have quoted from above the fees amounted to \$1.00 for each pole, and also \$2.50 for each mile of wire owned by the company.

See also *Philadelphia v. Am. U. T. Co.*, 167 Pa. 406; *Chester v. Western Union Tel. Co.*, 154 Pa. 464; *New Hope v. Postal Tel. C. Co.*, 202 Pa. 532; 16 Pa. Super. Ct. Rep. 306.

In *Postal Telegraph Co. v. Mayor, etc.*, 79 Md. 502, 511, it is decided that a city having power to regulate the use of its streets by poles and wires, etc., may impose a tax of \$2.00 on each of the poles erected therein. The standard taken to determine the reasonableness of the fee is the rental value of the streets, and the decision treats the fee as compensation for inconvenience to the public, or as a tax, and it quotes with approval *St. Louis v. Western U. T. Co.*, 148 U. S. 92, where a charge of \$5.00 upon each pole was upheld as a reasonable fee.

The cases from which I have quoted indicate that a fee is reasonable which varies in amount from \$1.00 to \$5.00, and

no fixed rule can be stated as to what will constitute a reasonable fee in any given case, but license fees of \$1.00 and of \$2.00 have been repeatedly upheld.

In *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, the court decided that what license fees are reasonable for supervising telephone companies under the police power, depends upon all the circumstances involved in the case. See also *City of Philadelphia v. Postal Tel. Co.*, 67 Hun. 21, and *City of S. Paul v. Dow*, 37 Minn. 20.

I reach the conclusion then that the city possesses ample power to pass an ordinance providing for the issuing of a license for each telegraph pole within the city limits and fixing a charge for the same or placing a tax or charge upon each pole and mile of wire, so long as such charges are reasonable.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 8, 1904.

CHARLES WERNO, Esq., Chairman,

Judiciary Committee of the City Council.

Dear Sir:

In your communication to the Corporation Counsel, bearing date December 23, 1903, you asked an opinion as to the validity of a proposed ordinance relating to bail bonds, a printed copy of which you submitted therewith, and of bonds taken in conformity with such an ordinance.

The suggested ordinance, according to the printed slip in my possession provides that "No special bail bond shall be taken except by a justice of the peace or by a *notary public* duly *authorized* by *such* justice of the peace to take the same, and no such bail bond shall be approved except by a justice of the peace," etc.

In your letter above mentioned you say:

"This ordinance changes Section 1567 of the Revised

Code, by empowering a justice of the peace to authorize a notary public to take bail bonds for violations of the city ordinances, and omits that provision which requires the principal and surety to sign the bond in the justice's presence."

The provisions of the Criminal Code (Ch. 38, Hurd's Rev. St., 1898) which bear upon the subject matter of bail, are as follows:

Sec. 294. "All persons shall be bailable before conviction except for capital offenses where the proof is evident or the presumption great."

Sec. 295. "All recognizances in criminal cases—when not taken in a court of record in open court, shall be signed by the persons entering into the same, and approved and certified by the judge, justice of the peace or other officer taking the same."

Sec. 298. "When a recognizance is taken for an offense cognizable by a justice of the peace it shall be conditioned for the appearance of the accused before the justice of the peace taking the same, etc."

Sec. 301. "The court, judge, justice of the peace or officer may examine the bail, on oath, touching their sufficiency and may receive other evidence for or against the same in such manner as he may deem proper."

The points to be determined are, then, whether or not under the laws in force in Illinois a justice of the peace can under authority of the council delegate to a notary public power to take bail bonds, provided the justice himself approves them, and also whether or not bonds so taken can be enforced against the obligors.

In Louisiana and other States, a liberal rule prevails which may be stated in rather general terms to be, that a bail bond may be executed in the presence of any officer of the court or other person designated by the court; but the allowance of bail, the determination of the amount in which the parties are to be bound, and the approval of the bond, are judicial acts which must be performed by the judge or officer authorized by statute to do them.

State v. Jones, 3 La. Ann. 9; *State v. Gilbert*, 10 id. 524; *State v. Smith*, 12 id. 349; *State v. McKeown*, 6 id. 596;

State v. Sewall, 3 id. 575; *State v. Wyatt et al.*, 6 id. 701; *State v. Leopold Loeb et al.*, 21 id. 599; *Dunlap v. State*, 66 Ark. 105; *State v. Houston et al.*, 74 N. C. 549.

But if the trial judge has made no such order admitting the accused to bail or fixing the amount of the bond, a bond taken by the sheriff under such circumstances is a nullity. *State v. Bazile*, 38 La. Ann. 542. And in *Sloan et al. v. People*, 23 Ill. 77, it was decided that a sheriff could legally take a recognizance after indictment found from a prisoner in his custody, although no writ had issued from the Circuit Court commanding an arrest, the court having fixed the amount of bail, continued the case and adjourned after the prisoner failed to tender the bail fixed. See also *Blackman v. The State*, 12 Ind. 556; *State v. Houston et al.*, 74 N. C. 549.

Where a statute only requires that recognizances in criminal cases not taken in open court "shall be in writing and shall be subscribed by the parties to be bound thereby" it has been held that it is only necessary that the accused or criminal should appear before the judge to confer upon the latter jurisdiction to let the criminal, etc., to bail, but the court also holds that though it is not necessary that the sureties in the recognizance appear before him in person it is the better practice to require it, and the judge would be justified in refusing to let a person to bail if the sureties do not so appear. *People v. Hurlbutt*; 33 Barb. 126.

In *Waugh v. The People*, 17 Ill. 561, it was decided that a sheriff in taking a recognizance conditioned for the appearance of a person to answer to an indictment cannot take bail for a larger sum than ordered by the judge; the court saying:

"The sheriff was bound to pursue his authority strictly, and when he departed from it he acted without authority and the recognizance was as void as if he had no authority whatever."

See also *Peacock v. People*, 83 Ill. 331, and *State v. Austin*, 23 Tenn. 213.

A recognizance taken before an officer not having judicial power is without any binding force. *Solomon v. The People*, 15 Ill. 291.

In the above case, the president of the town board examined the accused and required him to give security for his appearance in the Circuit Court or stand committed. He was committed to bail, but subsequently went before the Circuit Judge and acknowledged a recognizance conditioned for his appearance to answer the charge, and was released. The recognizance was declared forfeited after indictment. A *scire facias* was issued upon the recognizance against the surety and judgment obtained which the Supreme Court reversed, holding that the president of the board had no power to investigate the charge and require security or commit him in default thereof. See also *Jones v. Bunn*, 59 Ky. 490; *Morrow v. The State*, 5 Kan. 563.

The fact that an unauthorized clerk or other officer taking a recognizance was specially deputized by the court or other authorized officer, cannot validate either the act of such unauthorized officer or clerk or the recognizance itself. The power to bail cannot be delegated, being judicial. *Butler et al. v. Foster*, 14 Ala. 323; *Morrow v. The State*, 5 Kan. 563; *Luckett v. The State*, 51 Miss. 799. Nor can the court validate a bond or recognizance taken in a criminal case by a clerk of the Criminal Court who is without statutory authority to take such bond, etc., by entering a *nunc pro tunc* order approving the bond after the discharge of the prisoner. It is without validity. *State v. Caldwell*, 124 Mo. 509.

A recognizance has been given, in the two cases next cited, substantially this definition: "An obligation of record entered into before a court or officer duly authorized *for that purpose* with a condition to do some particular act." In *Clink v. Muskegon Circuit Judge*, 58 Michigan 242, the court said, quoting in part from another decision:

"To make a good recognizance or obligation of record, the form prescribed must be pursued, therefore they may not be acknowledged before any other person besides the persons appointed by the statutes, and the substantial forms of the statutes are to be observed.

"The statute requires that a recognizance or special bail may be taken before any justice of the Supreme Court or any Circuit Judge, Circuit Court Commissioner, or Clerk of any

Court of Record. Notaries public are not authorized to take such recognizance. A paper written in the form prescribed for special bail taken before a notary public is of no binding force whatever. It is not merely an irregularity, it is a nullity."

See also *Morrow v. The State*, 5 Kan. 563, where the recognizance was taken, acknowledged and approved in open court by a clerk of court; *State of Iowa v. Carothers*, 11 Ia. 273 (taken by a clerk of court in vacation); *State v. Woodward*, 159 Mo. 680 (a clerk of court fixed the amount of bail). *State v. Edwards*, 23 Tenn. 226.

The numerous decisions cited herein are more or less affected by statutes.

I find nothing in the Illinois statutes giving a notary public any such power as that with which the ordinance in question authorizes a justice of the peace to clothe him, so a notary cannot be invested with the power of taking bail bonds unless a justice of the peace can delegate such power to any clerk or other person.

I am further of the opinion that the words "or other officer" in Section 295 of the Criminal Code cannot be held to include a notary public, although they *may* include a sheriff. They should be construed as meaning "other officer similar to a judge, justice of the peace" or "other judicial or court officer."

I do not find any language in Section 298 of the Criminal Code which indicates any intention of giving to a justice of the peace the power of delegation here in question. Furthermore, the discretionary powers given by Section 301 before quoted are of such a nature that they should not be exercised without explicit authority therefor by statute to the person exercising them.

The result I reach, therefore, is that such an ordinance would be invalid and that bonds taken under it would be void, and I think the statement of the Michigan court above quoted correctly states the law.

Nor, do I find anything to change the views expressed, in Art. VI, Section 21 of the Constitution, Section 62, Clauses 66 and 96; Sections 66, 68, 69, 191 and 192 of Chapter 24 of

the Statutes (Hurd's Rev. St., 1901); or in Chapter 79, Sections 3, 16, 28 and 164.

Respectfully submitted,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN.

Corporation Counsel.

FEBRUARY 9, 1904.

MR. EDWARD B. ELLICOTT, City Electrician.

Dear Sir:

I acknowledge receipt of your letter of January 19, inquiring whether Section 206 of the Building Code conflicts with the electric sign ordinance passed December 21, 1903.

The first paragraph of said section reads as follows:

"All signs placed on any building above the level of the second story of the same, shall be made of incombustible material. Wooden signs shall not be made of greater width than two feet."

I am informed by the Building Commissioner that the clause "above the level of the second story" is construed by him to mean above the top of the second floor.

By Section 2 of the electric sign ordinance it is provided "that no electric sign shall project beyond the curb line. No projecting electric sign exceeding six feet in length shall exceed half its length in width."

It is apparent that the above provisions of both ordinances refer to the same subject matter, and that the provision of the building code that "wooden signs shall not be made of greater width than two feet," is inconsistent with the above provision of the electric sign ordinance.

Under such circumstances the rule is, that where there are two ordinances relating to the same subject matter, which are repugnant and inconsistent with each other, the later ordinance repeals the former. (*Cook & Rathbone Co. v. Sanitary District*, 177 Ill. 602.)

I am of the opinion, therefore, that inasmuch as the ordinance regulating the erection of electric signs is the latest ex-

pression of the legislative will of the city, its provision regarding wooden signs, above referred to, must, as to electric signs, prevail over the provisions of Section 206 of the building ordinance in conflict therewith.

The provision, however, in regard to the use of incombustible material, is not in conflict with and not repealed by the electric sign ordinance and must be applied thereto.

I agree with the opinion of Commissioner of Buildings Williams that the clause "above the level of the second story" means above the top of the second story.

Yours truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 13, 1904.

MR. F. X. BRANDECKER, Business Agent.

Dear Sir:

I have your communication asking for an opinion as to what course your department should pursue in placing an order for the installation of an intercommunicating telephone system of four portable desk telephones in rooms of the Board of Local Improvements in the City Hall. Your communication does not state the proposed cost of the telephones, but I assume that it is under five hundred dollars.

In an opinion of this date transmitted to your department I have called your attention to the original ordinance and the amendments thereto by which your power in purchasing supplies is created and limited.

Section 9 of the ordinance of January 17, 1898, provides:

"It shall be the duty of the said purchasing agent to make all purchases upon terms most advantageous, and to this end he shall procure competitive proposals from at least two responsible persons, firms or corporations, and shall take advantage of the lowest prices quoted for goods of equal value. In all cases wherein is involved the expenditure of sums in excess of two hundred (\$200) dollars and below five hundred

(\$500) dollars, he shall procure proposals in writing from at least three bidders, which proposals shall be filed with the requisitions pursuant to which the said expenditures are made."

It seems to me to be clearly the intent of this section that discretion should be lodged in you in making all purchases with reference to the kind of article furnished, provided you procure an article equal in all respects to the one requisitioned. Were the departmental heads to name an article manufactured only by a particular firm, and were it imperative upon you to obtain such article from such firm, the provisions contained in the section with regard to securing proposals would be entirely inoperative. A certain discretion rests with you to select from a number of persons the one offering the best article at the lowest price. Were such discretionary power transferred from you to the head of the department making the requisition, it would clearly deprive your office of one of its most useful functions and one which seems most clearly to have been in the mind of the council in passing the ordinance in question. The object of Section 9 is in the end to save the taxpayers money in securing supplies for the city at the lowest cost, and to interfere with your duty to call for bids would be, in my opinion, directly antagonistic to this subject.

It is not, however, the intention of the writer to place such a construction upon your powers as would deprive the head of a department of his ability to order an article or appliance of a special or particular type which from experience he had found was peculiarly applicable for doing the work of his department in the method which he desired to continue. Numerous instances might arise in which the long continued transaction of departmental business in a particular manner might require the selection of certain designated instrumentalities, the desirability and suitableness of which the head of the department must be the proper judge. A selection by him of any such instrumentality could not, in my opinion, be limited or restricted by you where it was apparent that the departmental methods pursued might be impaired thereby.

I am therefore of the opinion that you should be given the opportunity of furnishing telephones of the same general type and equally as good as those named in the requisition,

from persons or firms whose bids will enable you to take advantage of the lowest market prices.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 18, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You have addressed to this department the following inquiry: "Is not the sinking fund a trust fund which cannot be diverted to other purposes than the payment of bonds, and if so, what are the legal remedies which might be invoked by taxpayers, or others, to prevent the use of the sinking fund for other purposes, or to punish the misapplication thereof?"

In answer to this inquiry, I beg leave to state that the sinking fund is in the strictest sense of the word a trust fund. Section 12 of Article IX of the Constitution of 1870, provides, among other things, as follows:

"Any . . . municipal corporation incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

This provision of the Constitution is mandatory and self-executing. Under its provisions the ordinance authorizing an issue of bonds must in one of its sections provide for the payment of the principal within twenty years. The sinking fund in question is money now lying in the city treasury as the result of the provisions of such ordinances. It was levied for the purpose of retiring such bonds, collected from the people by taxation for that purpose, and cannot be lawfully used for any other purpose. Such an attempted misapplication of the sinking fund might be immediately prevented by injunction on the part of any taxpayer. The officer paying out the money for any other purpose would be liable upon his official

bond, and would, in my opinion, also be liable to criminal prosecution under the provisions of Section 208 of the Criminal Code of Illinois, which, so far as material here to be quoted, reads as follows:

“Every person holding any public office . . . who shall be guilty of diverting any public money from the use or purpose for which it may have been appropriated or set apart, by or under authority of law . . . shall be fined not exceeding \$10,000 and may be removed from his office, trust or employment.”

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

FEBRUARY 26, 1904.

MR. L. E. GOSSELIN, Auditor.

Dear Sir:

In your favor of the 19th inst., you requested of the Corporation Counsel an interpretation of Sections 2 and 3 of an ordinance passed December 21, 1903, which appears upon the council proceedings of that date at page 1870, with a view to making a proper charge for the installation of electric signs, and particularly inquired as to whether the fees authorized to be charged by the ordinance in question were annual fees.

Section 2 of this ordinance provides:

“The owner of or person having control over any sign authorized by this ordinance shall pay to the City of Chicago an inspection fee to cover expense of inspection, to be computed on the *outside dimensions of signs* according to the following classification and schedule:

“*Projecting Signs.*

“The fee for all projecting signs, including vertical as well as horizontal, shall be computed at the rate of fifteen (15) cents per square foot of sign space. . . .

“*Flat Signs.*

“The fee for all signs placed against buildings shall be computed at the rates now provided in the ‘Rules, etc.’ . . .”

The following is an extract from Section 3, which appears to bear upon the question of construction involved:

"The City Electrician shall issue to the applicant a construction permit limited to a period of construction only. The City Electrician shall upon being notified of the completion of such sign cause an inspection of the same to be made, and if such sign has been constructed in accordance with the provisions of this ordinance he shall then issue an electrical permit without cost for the operation and maintenance of such sign, limited to one year from the date of issuance of such permit."

I am of the opinion that the words "on the outside dimension of signs" refers not to the dimensions of the signs outside of or away from the building, but that every side of an electrical sign, whether away from or towards the building, is to be measured for the purpose of fixing the amount of the inspection fee, and that the words "sign space" mean the sum of all the sides of any sign.

That portion of Section 2 which appears under the head of "Flat Signs" is in itself absolutely meaningless, and unless the meaning of "Rules, etc.," can be determined by reference to other sections or provisions of the ordinance, the paragraph must be eliminated. I think, however, that by reference to Sections 3, 5 and other parts of the ordinance, the meaning of "Rules, etc.," is shown to be "Rules and Requirements of the Chicago Fire Department and Department of Electricity" and therefore these rules may be referred to to discover the fee to be charged for flat signs.

It is exceedingly difficult to determine from this ordinance what the precise intention of the council was in enacting it, but inasmuch as Section 1 of the ordinance begins with the words "It shall hereafter be unlawful for any person, firm or corporation to erect or maintain . . . any electric sign," etc., and since Section 2 provides for the payment of an inspection fee, while Section 3 shows that the inspection in question is to be made after the construction of the sign, and the free permit to be issued after inspection shall only authorize the operation and maintenance of such sign for one year, I believe it may be said to have been the intention that at the expiration of the free permit last mentioned, the City Electrician has the right to compel the payment of an-

other fee for inspection, and subsequent to such inspection to issue a further permit good for one year, and I therefore conclude that the inspection fees required by Section 2 of the ordinance are annual fees.

Very truly yours,

MACLAY HOYNE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

FEBRUARY 29, 1904.

MR. JAMES C. BLANEY, Chief Inspector of Steam Boilers and
Steam Plants.

Dear Sir:

Replying to your letter of the 19th inst., asking if there is any way in which your department can compel the owner of the Marlowe Theater, at 63d and Wentworth avenue, to remove the boilers from beneath the foyer of the theater and place them in a part of the theater less dangerous to the patrons thereof, I beg leave to advise you that so far as I know there is no ordinance regulating the placing of boilers under such circumstances.

However, by Clause 63 of Section 1 of Article 5 of the Cities and Villages Act, the City Council has the power to pass an ordinance "to prevent the dangerous construction and condition of . . . boilers and apparatus used in and about any building or manufactory, and to cause the same to be removed or placed in a safe condition when considered dangerous, . . ."

I am of the opinion, therefore, that the City Council has the power to pass a general ordinance regulating and prescribing the location of boilers in buildings of this character.

Yours truly,

MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

FEBRUARY 29, 1904.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

On the 17th inst. your honorable body passed the following order, as appears on page 2257 of the council proceedings of that date:

"Ordered, That the Corporation Counsel be and he is hereby directed to prepare an ordinance for controlling the advertisements in the surface street cars in the City of Chicago and report the same at the next regular meeting of this council."

In compliance with the above order I have prepared a draft of an ordinance, and while the power of the City Council to enact such an ordinance is not free from doubt, I am of the opinion that it can be sustained.

Article 5, Section 1 of the General Act for the Incorporation of Cities provides that the City Council shall have the following powers among others:

"*Fourth.* To fix the amount, terms and manner of issuing and revoking licenses."

"*Ninth.* To regulate the use of streets."

"*Seventeenth.* To regulate and prevent the use of streets, sidewalks and public grounds for signs, signposts . . . and advertisements.

"*Eighteenth.* To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or handbills in the streets or public grounds or upon sidewalks."

It is a familiar rule that an ordinance may derive its validity from several different grants of power and does not depend solely upon any single section or clause of the statute.

Gundling v. City of Chicago, 176 Ill. 340.

The examination of the ordinance transmitted herewith makes it perfectly apparent, in view of the amount of fees imposed for a license, that such fees are designed for the purpose of revenue and not for the purpose of regulation. It seems too clear for argument that the imposition of a license fee of twenty-five per cent of the gross receipts from a given busi-

ness, in the absence of extraordinary conditions, is a revenue provision.

The question then is whether assuming that the fees fixed in this ordinance are framed with the design of obtaining revenue for the city, the ordinance is valid.

In *City of Corrollton v. Bazzette*, 159 Ill. 284, the court said (p. 299):

“Under the liberal rule adopted by this court, such license fees, while imposed under the general police power, may, as we have seen, be imposed not only as a mere means of regulation, but also for revenue. Under such rule it becomes a question, not always easy of solution, to determine whether or not the imposition of a certain amount to be paid as a license fee is an oppressive exercise of a statutory power, having the effect, whether so designed or not, to suppress and prohibit the business upon which it is imposed, rather than merely to license and regulate it, and require it to bear its due share of the public burdens. And it must be admitted that the question, so far as it comes within the discretion of the municipal authorities, is one for them and not for the courts to determine. It is only when the ordinance is plainly unreasonable and prohibitive in its character, where there is no power to prohibit, that the courts may interfere and pronounce it invalid.”

In *Kinsley v. City of Chicago*, 124 Ill. 359, the court held that under a power to regulate a calling or business only, without express powers of taxation, a license fee may be enacted, and the fact that such fee may exceed the necessary or probable expense of issuing the license and inspecting the business it covers, will not render the fee exacted illegal or unreasonable. In the course of its opinion the court said:

“It is next insisted that if the power ‘to regulate’ confers the power to require a license, then the license fee cannot be fixed at such a sum as will result in producing a revenue for the city. That to sanction such a result there must be expressly given the power ‘to tax’ . . . But this court has always applied a more liberal rule of construction in reference to license fees.”

And the court having cited numerous cases, resumed:

“In the above cases license fees in quite large amounts, manifestly in part at least for revenue, were sustained and the force of these decisions in their application to the present case is not avoided by the fact that there was given there the express power to tax, license and regulate, as the license fees were sustained under the power to license and not under the power to tax.”

See also *Chicago Packing Company v. City of Chicago*, 88 Ill. 221.

It should be said that the authority of the *Kinsley case* has never been questioned. See for example *City of Chicago v. Collins*, 175 Ill. 445.

The holding in the *Kinsley case*, as shown by the above quotation, is in effect that a power to regulate is equivalent to a power to license, and those cases which sustained license fees under such power to license hold that the fee may be imposed for revenue, and that the amount of it is a matter for the decision of the legislative body within its discretion and that the fee will not be held unreasonable in amount unless it is so excessive as to constitute a prohibition of the business licensed.

[Citing cases.]

In applying the above mentioned authorities to the present ordinance, it is important to observe that among the powers granted to the City Council which we have enumerated above are the powers not merely to regulate, but the powers to “prevent the use of the streets . . . for signs . . . and advertisements” and to “prohibit the exhibition or carrying of banners, placards, advertisements . . . in the streets,” and therefore the city is granting to such street railway companies as have already embarked, or may embark, in the business of displaying advertisements a privilege, by the proposed ordinance, which under its powers the city might, if it saw fit, deny them.

Dennehy v. City of Chicago, 120 Ill. 627.

The streets of Chicago are kept in repair and made fit for use by the expenditure of large sums of money from time to time by the city, and the money charged for licenses to dis-

play advertisements in the streets of the city, whether in or upon street cars, or in any other manner, should be regarded as only a proper compensation for the beneficial use received by the advertiser.

I think it reasonably clear that the fact that the method of fixing the license fee, in the ordinance submitted herewith, by exacting a percentage of the gross receipts of the business is without effect upon any of the questions involved, nor can it be said that because any of the street railway companies which are affected by this ordinance have been engaged in advertising for some time past they therefore have vested rights which the city lacks the power to disturb. Nor, again, is the power to enforce this ordinance against street railway companies affected by the fact that such companies may pay an occupation tax upon their street railway business. A person who pursues several occupations may be compelled by a city, if authorized by its charter, to procure a license for each business although the different kinds of business are carried on in the same establishment.

Daus v. Macon, 103 Ga. 774, and

Simrall v. Covington, 90 Ky. 444.

I conclude, therefore, that although the amount imposed as a license fee by this ordinance is considerably larger than the amounts held reasonable in most of the cases cited herein, yet in view of the power of the city to absolutely prohibit placards, signs and advertisements in the streets, and upon the principle of the cases cited, the ordinance may be upheld.

Respectfully yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 29, 1904.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

I have your letters of recent dates transmitting a report from Inspector Hunt to the effect that the Hyde Park Pro-

tective Association has protested against a saloon conducted by one Charles Blomberg, at 10101 Ewing avenue, for the reason that the original petition upon which the dram shop license was issued did not contain the necessary majority of frontage; that the said petition was signed by one C. A. Pomeroy, as agent for Esther E. Taylor, but that he did not have power of attorney to sign the same. Attached to the report is an affidavit of C. A. Pomeroy to the effect that Esther E. Taylor consented to Pomeroy acting as her agent for the purpose of signing said petition:

The report further states that:

"If this verbal agreement is void, and Mr. Pomeroy had no legal right to sign Esther E. Taylor's name to this petition, then the saloon is running without the necessary frontage, and I would ask that the license be revoked."

You state in a later letter: "It is claimed by the Hyde Park Protective Association that the Esther E. Taylor signature is void on account of its being, as the association claims, a purchased consent." You then ask this department to pass upon both questions raised in said communication. *First*: Had Pomeroy authority from Esther E. Taylor to sign her name to the petition? *Second*: Was the Esther E. Taylor consent purchased?

Blomberg's application for license is dated January 5, 1903. Pomeroy signed as agent for Esther E. Taylor for (1) 260 feet on Ewing avenue, (2) 154 feet on 101st street, (3) 243 feet on 102d street, (4) 493 feet on Avenue "J," (5) 300 feet on Ewing avenue, and (6) 194 feet on Avenue "J." Six others signed the petition for an aggregate frontage of 216 feet.

Pomeroy's affidavit, above referred to, is as follows:

"State of Illinois, Cook County—ss.:

"C. A. Pomeroy, of the City of Chicago, County of Cook and State of Illinois, being duly sworn, doth depose and say that the parties negotiating with him as agent for Esther E. Taylor for the purchase of Lot 48, Block 1, Taylor's Third Addition to South Chicago, told him that it was wanted for saloon purposes; and he informed Mrs. Taylor that the lot could be sold, but was wanted for saloon purposes, and in the

event of the sale he, of course, would be expected to sign a petition for a license as agent for her property. To this proposition she consented, and the sale was made accordingly.

“And further this deponent says not.

“C. A. Pomeroy.

“Subscribed and sworn to before me this 6th day of November, 1903.

“Andrew Ringman,

“Notary Public.”

The following affidavit of Andrew Ringman has also been exhibited:

“State of Illinois, County of Cook—ss.:

“Andrew Ringman being duly sworn upon oath doth depose and say: . . . Charles Blomberg now conducting a saloon at 10101 Ewing avenue, South Chicago, came to affiant on or about January 2, 1903, to negotiate for the purchase of Lot 48 in Block 1, Taylor’s Third Addition to South Chicago, upon which said saloon is located, and in the course of negotiations informed affiant that affiant would be required to obtain the signature of Esther E. Taylor, the then owner of the property for a petition for a saloon on that lot; for the balance of her property. Whereupon affiant refused further with such negotiations.

“And further this deponent says not.

“(Signed)

Andrew Ringman.

“Subscribed and sworn to before me this 20th day of November, A. D. 1903.

“(Seal)

“Cyrus A. Pomeroy,

“Notary Public.”

It appears from the Pomeroy affidavit that he was authorized by Esther E. Taylor to sign her name to a petition consenting to the issuance of the said license. The claim has been made by the representatives of the Hyde Park Protective Association that unless authority to sign the frontage petition as agent is exhibited and established at the time of signing, the frontage signed by such person should be excluded, and that the principal’s ratification of the act of the agent is invalid after the issuance of the license.

Our Supreme Court has passed upon this proposition in

the case of *McVey v. City of Danville*, 188 Ill. 428, saying, at page 430:

“Appellants admitted that the owners of 6,953.48 feet signed the petition and gave the required consent, but as to the remainder objected that the signers were either not the owners or had no authority to sign the petition. One of these signers was the Peoria & Eastern Illinois Railroad Company, the owner of property abutting on the street a distance of 4,481 feet. The petition was signed in the name of the Railroad Company, ‘J. A. Barnard, General Manager.’ There was no evidence of a want of power in Mr. Barnard, who was proved to be the General Manager of the Railroad Company, to sign the name of the company, and the only claim was that he had no implied power, as a matter of law, to do such an act in the absence of proof of express authority from the company. *The court was asked to presume that the signature to the petition was unauthorized, while the presumption created by the statute is to the contrary. It is not necessary that the authority of the agent to sign such a petition should accompany the petition or appear upon the face of it. (Tibbitts v. West and South Town Railway Co., 153 Ill. 147.)*”

In the recent quo warranto proceeding filed by Deneen, States Attorney, in the case of the People against Theurer and Wallschlag, case number 230,249, Circuit Court of this county, to test the validity of licenses issued by the Mayor of Chicago, Judge Baker held that if the authority of the agent was attacked, it might be shown subsequently to the signing of the application, and *held* as a proposition of law in that case “that the signature of Leo Hettich as the agent of Mary Hettich, to the petition of Joseph Theurer, for a dram shop license to be issued to Joseph Theurer, *might be ratified by a written instrument subsequently executed, ratifying said signature and dated subsequent to said signing of said application by said Leo Hettich.*”

In my opinion, from the evidence before me, Pomeroy had authority to sign as Esther E. Taylor’s agent, the fact that his authority was not exhibited at the time of so signing will not nullify his action in so doing, and the principal has power to ratify the act of the agent.

The objection that the said consent of Esther E. Taylor, signed by Pomeroy, her agent, was a *purchased* consent is a more serious objection, and if the evidence that such consent was purchased is clear and convincing, then, under the decisions of our courts, such signature is invalid and should be rejected.

Our Supreme Court said in *Doane v. Chicago City Railway Company*, 160 Ill. 22, at page 31:

"The question thus arises, whether the consent of a property owner to the laying down of a street railway in the street upon which his property abuts, *can be purchased for money, or for a consideration inuring to the exclusive benefit of such owner*. We do not think, that it was the intention of the legislature, in the adoption of Paragraph 90 as above quoted, to make the consent of the abutting owner in such cases a purchasable article. An agreement based upon the purchase of the abutting owner's consent to the laying of the proposed tracks in a public street is illegal as being against public policy, and will not be enforced by the courts."

Pomeroy says in his affidavit that "the parties negotiating with him as agent for Esther E. Taylor for the "purchase of Lot 48, Block 1, Taylor's Third Addition to South Chicago, told him that it was wanted for saloon purposes, and he informed Mrs. Taylor that the lot could be sold, but was wanted for saloon purposes, and in the event of a sale he, of course, would be expected to sign a petition for a license, as agent for her property. To this proposition she consented and the sale was made accordingly."

Applying the reasoning of the Supreme Court in the Doane case, *supra*, to this state of facts, I am of the opinion that the consent of Esther E. Taylor to said license was purchased and therefore invalid.

I return herewith Inspector Hunt's report and Pomeroy's affidavit.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 1, 1904.

F. I. BENNETT, ESQ., Chairman Committee on Finance.

Dear Sir:

Replying to your question whether a city employe who works overtime, during the period for which no appropriation has yet been made, is entitled to extra compensation, I have to say that, in our opinion, every such person must be contented with the sum offered by the head of the department for services to be rendered by such employe, and he is not entitled to anything in addition to the amount so offered. His acceptance of the offer makes a contract, and there is no obligation to pay more than the amount offered.

In all cases for which appropriation has been made for salaries where the employment is by the month or year the employe must work the full period, and he cannot recover anything for overtime. He accepts the position under the promise implied from the appropriation ordinance that he will be paid a fixed amount for the work of that department.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

MARCH 2, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have a communication from the attorney of the Hyde Park Protective Association, referred by you to this department for an opinion as to whether or not, in a district where frontage consents are necessary to be attached to a petition for a dram shop license the applicant, having obtained the license upon a petition containing an insufficient number of names, can subsequently file an additional number of names sufficient to complete the total number necessary to his petition.

It appears that one Mandernack obtained a license to operate a saloon at 68th street and Cottage Grove avenue in this city in the Hyde Park district, where a certain number of

frontage consents are requisite to enable the applicant to obtain a license. After the issuance of Mandernack's license it was discovered that the original petition was defective in that it did not contain the names of the necessary number of householders, and that there was also a deficiency of property-owners frontage. Subsequently, after the issuance of a license, Mandernack added signatures to his petition (presumably sufficient to make up the required number) and has since been allowed to operate under the license. The question presented is whether under the law the licensee could correct the infirmity in his petition by subsequently added names.

The general doctrine of the Supreme Court of this State, as expressed in many opinions, is that the dram shop is an evil which may be totally suppressed, and when allowed to exist under conditions prescribed by State and municipal authorities, a strict compliance with these conditions is exacted. The petition of the applicant I am inclined to consider a jurisdictional prerequisite by which the licensing power is set in motion, and in this respect I cannot see that it differs from the various other petitions which the different statutes have provided as the means of setting in motion various governmental and judicial bodies. The petition is the foundation of all subsequent acts of the licensing power, and its purpose having been accomplished by the issuance of the license, it becomes *functus officio*. From this view of the subject, the license having issued, it would not be possible to revive the petition for any further function by adding to it or amending it in any way. I see much force in the suggestion that were the applicant permitted to come in after the issuance of the license and attach additional names to his petition, this process might be carried on indefinitely, and though the original petition was far short of the requisite number of names, he could, by bringing in names from time to time, cure this defect. I think this is not the purpose of the ordinance in force in this district. It may also be noted that were the petition allowed to be supplemented with additional names from time to time after the issuance of the license, there would be no certainty that the original signers of the petition were still willing to have the license remain in force, or, in other words, I think the ordi-

nance contemplates that all those in the neighborhood, whose consents the ordinance makes necessary, should sign one petition at a time prior to the issuance of the license.

The theory that the petition is jurisdictional logically compels drawing the conclusion that the petition must be strictly in conformity with the law before a valid license can issue thereon.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Acting Corporation Counsel.

MARCH 2, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have a communication from you asking whether or not your department may issue warrants for collection, on various estimates of the cost of construction of the East Division street bridge, to the contractors, or whether it is necessary that the bridge be fully completed before the Chicago Union Traction Company or its successors shall be called upon to pay its proportionate share of the cost. From a subsequent communication from you I learn that the bridge at Division street over the canal was completed on March 13, 1903, and so assume that the bridge referred to in the present communication is the one over the North Branch of the Chicago River, at Division street. The construction of this bridge was provided for in an ordinance passed March 14, 1887, to the North Chicago Street Railway Company. (Special Ordinances, p. 1485.) Section 1 of that ordinance provides among other things:

"Section 1. In consideration of the acceptance hereof and the undertaking by the North Chicago Street Railroad Company to comply with the provisions and conditions herein contained, permission and authority are hereby given the said company, its successors and assigns, to construct, maintain and operate, for the period of twenty years from and after the passage of this ordinance, a street railroad in, along and

upon the following named streets in the city of Chicago:

“North avenue, from Clark street to Milwaukee avenue, with a double track, except upon the bridge and approaches thereto, across the north branch of the Chicago River, where only a single track may be used; and said company may make all necessary and convenient sidetracks, turnouts, curves, switches and connections with any street railway tracks which may be intersected by the tracks hereby authorized; Provided, that if the City of Chicago shall hereafter, during the term of the license hereby granted, provide by ordinance for the construction of new bridges over the north branch of the Chicago River at Division street and at North avenue, to be used and to take the place of the present and existing bridges over said river at said points, the said company, in consideration of the license hereby granted, agrees to pay to the city of Chicago one-half of the first cost of each of said bridges, including piers and abutments; Provided, that said company shall not be required to make said payment until after the expiration of ten years from the date of the acceptance of this ordinance by said company.

“Said company further agrees, in consideration of the license herein granted, to pay to the City of Chicago the sum of two hundred and fifty (\$250) dollars per annum toward the cost of maintaining the bridge over the north branch of the Chicago River at Division street, and the sum of two hundred and fifty (\$250) dollars per annum towards the cost of maintaining the bridge across said river at North avenue; said payments to date from the date of the laying of tracks across said bridges by said company.”

From the language used in this section it appears that had the bridge been built within ten years from the acceptance of the ordinance by the company, a payment could not have been exacted from the company until the expiration of ten years from the acceptance of the ordinance, namely, April 4, 1897. I think it thus clearly appears from said language that it was not the intention of the Council to compel payment for this structure during the progress of the work.

This being so, I am of the opinion that it would be nec-

essary for you to wait for the completion of the bridge before you can call upon the traction company to pay its proportionate share of the cost.

Yours very truly,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Acting Corporation Counsel.

MARCH 7, 1904.

MR. WALTER J. RAYMER, Chairman,

Sub-committee on Elevated Railroads of Committee on
Local Transportation.

Dear Sir:

There has been submitted to me a proposed ordinance to the Metropolitan West Side Elevated Railway Company, with a request that I make to your sub-committee suggestions as to amendments which should properly be made to this ordinance. The points which occurred to me, and which I think should be added to the ordinance by way of amendment or embodied in an entirely new ordinance, I will state as follows:

First. Section 1 of the ordinance gives the right to the company to construct, maintain and operate "two or more railroad tracks (not exceeding four in all) as said company, its successors, assigns or lessees may from time to time determine," etc. I would suggest that the number of tracks to be constructed by the company to be limited to the ones now intended to be built, and that it is inadvisable to embody in the ordinance language giving such latitude to the company to determine at any time it may see fit in the future how many tracks not exceeding four in number it shall build.

Second. The same section of the ordinance gives the company power to locate its line of road across lands and property which may be acquired by lease or otherwise and "over and across any and all intervening streets, alleys, highways and public places now or hereafter to be laid out, located, dedicated or traveled, including any intervening railroad tracks between Fifty-second avenue and Austin boule-

vard." This provision for acquiring a right of way is decidedly broader in its scope than the authority to acquire right of way given in similar ordinances to this and other elevated railway companies. The usual words used in other ordinances are "over, along, upon and across such lots, lands and property as the company now owns or may hereafter acquire by lease, purchase, condemnation or otherwise." We can see no reason at present why any such addition should be made as is inserted in the ordinance under consideration. The provision in this section of the ordinance for crossing railroad tracks is unnecessary and is covered by statutory provisions.

Third. This section also provides for "curves, spurs, side tracks, switches, sidings, turnouts, connections, telegraphs, poles, trolleys, telephones, signal and other devices" as the company may deem necessary for the operation of its railroad. Similar provisions in various ordinances granting rights to the elevated railroad companies in this city have been the cause of much conflict of opinion, and have given rise to vexatious litigation by reason of the fact that the companies have claimed that such similar provisions gave them the right to construct from time to time when necessary in their opinion. The city, on the other hand, has held that language of similar import refers to the original construction of the road and that when the structure is complete the power to make changes is exhausted. In view of the uncertainty necessarily arising from such vague expressions, I would suggest that an amendment be added either designating the specific number of curves, etc., desired to be constructed, or giving the company the right to construct such appurtenances at the time of the original construction of the road, and denying any continuing power to it. Many of the other railroad ordinances contain a provision, and it appears to me that this ordinance should contain a like provision, making it obligatory upon the company to submit for approval to the Commissioner of Public Works, before the construction of the work shall be commenced, the plans and specifications of the entire structure

It also occurs to me that it might be well to have the location of the stations which the company proposes to erect enumerated in the ordinance; and I also think that the num-

ber of side tracks and switches should be subject to the approval of the Commissioner of Public Works.

Fourth. There should, in my opinion, be added to this ordinance a provision requiring the line to be built within a certain time, and on failure to construct it within the time named there should be a forfeiture of rights, and possibly a payment of a certain sum to the City Treasurer as liquidated damages for failure so to complete the line within the said time.

Fifth. An indemnity clause should be inserted saving the city harmless against damages, including land damages, judgments, decrees, etc., which might arise through the exercise by the company of the privileges granted by the ordinance.

Sixth. I would suggest the insertion of a provision for a deposit of cash or bonds with the City Treasurer as security for the faithful performance and observance of the provisions and conditions of the ordinance.

Seventh. The question of compensation is entirely omitted from the ordinance, and if your committee desires to follow the precedent already established in obtaining compensation from other railroad companies, I would suggest that a clause be added providing for the annual licensing of every car owned by the company and the posting of all licenses in the cars in a conspicuous place. Much difficulty has arisen between the city and the various companies regarding the question of taking out licenses for their cars, the companies claiming that only cars used should be required to be paid for and the city insisting that every car should be required to be provided with a license. In order to avoid constant friction, I would suggest an amendment making it obligatory upon the company to take out a license for every car owned by it, whether in use or not, and whether used regularly or only occasionally.

Eighth. I think provision should be made in the ordinance for the illumination of the street intersections under the structure of the elevated railroad.

Ninth. Some appropriate clause should be added compelling the restoration of the streets by the company, and safe-

guarding the water, sewer or gas pipes, telegraph wires, etc., in or upon such streets as the elevated railroad may cross.

Tenth. The city should also have the right to use the structure authorized by this ordinance for placing thereunder its police, fire alarm and telephone wires without charge.

Eleventh. A provision should be added for suitable devices to be placed and maintained beneath all station buildings located at street intersections, and the platforms of such buildings, to intercept and carry off storm water and drippings from snow.

Twelfth. The city should reserve the right, by an appropriate clause, at all times when it may deem necessary to change the grade of any street or alley which the railroad may cross without incurring any liability on the part of the city to the company, and making provision so that in case the grade of the street is raised above a certain height, a corresponding change in the elevated structure shall be made, insuring a definite height in the clear between the pavement and the lowest part of the elevated structure.

Thirteenth. By Section 3 of the proposed ordinance, permission is given to the company "by contract with outlying suburban railroad companies to permit any such suburban railway company or companies to operate its or their cars and trains for transportation of passengers and mail only over the lines or railroad of the said Metropolitan West Side Elevated Railroad Company." By this provision the company would be enabled, if it saw fit, to allow a suburban railroad company using a different motive power than its own to use its tracks. The use of steam as a motive power might thus be employed over the tracks of the elevated company, and various changes in the style of cars and equipment might be used by the connecting suburban railway companies of which the ordinance did not permit the elevated company itself to make use. In this connection I will merely suggest that the use of the elevated structure by the suburban railway companies opens a wide door to many changes and conditions which do not appear upon the face of the ordinance, and which at some future time the city would find very irksome.

Fourteenth. There is no provision in the ordinance fixing

the rate of fare for a continuous trip within the city limits, nor any provision for carrying free of charge policemen, firemen and mail carriers in uniform.

It has been thought best not to prepare any amendments nor to draw an entirely new ordinance embodying the amendments until your committee has passed upon the suggestions made in this opinion.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

MARCH 7, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have a communication from you of recent date transmitting an inquiry from the City Engineer as to the liability of the North Chicago Street Railroad company for the cost of construction, maintenance and operation of bridges over the North Branch of the Chicago River and the North Branch Canal at Division street.

In an opinion rendered you a short time ago this department advised you as to the liability of this company for the cost of construction of these bridges, and therefore I will confine myself to the liability of the company for the cost of maintenance and operation of the bridges over the North Branch of the Chicago River and the North Branch Canal at Division street.

Considering first the question of the cost of the maintenance, and operation of the bridge over the *North Branch* at Division street, Section 12 of an ordinance granting rights to the North Chicago Street Railroad Company, passed December 20th, 1886 (Vol. 2, Special Ordinance, p. 1481) provides:

"If the City of Chicago shall hereafter, during the term of the license hereby granted, provide by ordinance for the construction of new bridges at Division street in said city,

over the North Branch Canal and the North Branch of the Chicago River, or either of them, to be used and take the place of the existing bridges over said river, the said company, in consideration of the license hereby granted, agrees to pay to the City of Chicago, as required by said city during the progress of their construction, one-half of the first cost of each and every one of said bridges, including piers and abutments, and one-half of the expense, payable annually, of operating and maintaining each and every one of said new bridges and making any renewals, improvements, enlargements and replacements thereof; such annual payments to commence whenever the new structures are ready for use, and to be continued every year thereafter until the termination of the license hereby granted."

By the terms of an ordinance to the same company, passed March 14th, 1887 (Vol. 2, Special Ordinances, p. 1485), it is provided that the company agrees "in consideration of the license herein granted, to pay to the City of Chicago the sum of \$250 per annum toward the cost of maintaining the bridge over the North Branch of the Chicago River at Division street, and the sum of \$250 per annum toward the cost of maintaining the bridge across the said river at North avenue, said payments to date from the date of the laying of tracks across said bridges by said company."

I think the provision of the ordinance last quoted refers to the cost of maintaining the bridge across the North Branch of the Chicago River existing at the time of the passage of the ordinance, and does not refer to the cost of maintaining a bridge across this stream subsequently built; that therefore the provisions of Section 12 of the ordinance of December 20th, 1886, apply to the present new bridge, and that this company is liable for one-half of the expense of operating and maintaining this bridge, which cost is payable annually.

Considering next the bridge across the North Branch Canal at Division street, Section 12 of the ordinance of December 20th, 1886, above quoted, provides for the payment by the company of one-half the expense of operating and maintaining this bridge. This provision is not altered by the language of Section 1 of the ordinance of March 14th, 1887, above

quoted, as the portion of that section applicable to bridges applies to the bridge over the North Branch of the Chicago River at Division street. Neither does Section 8 of the last named ordinance control, as in my opinion the language of this section applies to the planking and repairing of the bridge over the North Branch Canal in existence at the time of the passage of the ordinance, namely, March 14th, 1887.

I am therefore of the opinion that as to the last named bridge, the company is liable for one-half the expense of operation and maintenance thereof, in accordance with the provisions of Section 12 of the ordinance of December 20th, 1886.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 7, 1904.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

Your Honorable Body adopted on February 8th last the following order, which appears upon pages 2126 and 2197 of the Council proceedings of said date:

“Ordered, That the Corporation Counsel be directed to render an opinion to this Council regarding the power of the city to enforce an ordinance compelling elevated railroads, in case of unreasonable delay, either to return the fare or to give a ‘delay check’ good for a subsequent ride to the patron.”

The determination of the question submitted largely depends upon what duties an elevated railroad owes to the public.

It is clear that a street railroad company is a common carrier of passengers for hire.

Union Traction Co. v. City of Chicago, 199 Ill., 484-522.

It is the duty of such a carrier to transport its passengers safely and promptly to the point of destination.

Am. & Eng. Enc. of Law, 2d Ed., Vol. 5, pp. 583 to 586 inclusive.

It has been held that where a person by his contract with a carrier is entitled to a continuous trip from one point to another, if from any cause not the fault of the passenger, or the result of his carelessness or wrong, the company is prevented from furnishing a trip according to its contract to a point of destination, and the passenger is left between two points, he has a right to go upon the first train to his point of destination, and the carrier is liable for any interference with such right by any of its agents.

Watkins v. Pa. R. R. Co., 21 D. C. 1; see also

Van Horn v. Templeton et al., 11 La. Ann. 52.

Gulf C. & S. F. R. Co. v. Looney, 85 Tex. 158; 16 L. R. A. 471.

Or, in such a case of delay a passenger may leave the train and take another train the following day without a new contract or ticket.

Wilsey v. L. & N. R. R. Co., 83 Ky. 511; and generally, see also

Van Buskirk v. Roberts, 31 N. Y. 661.

Pa. Co. v. Hine, 41 O. St. 276.

And even although the delay mentioned results from the act of God, and the journey may not be made or continued on the particular train intended, yet a passenger is entitled to his trip on some other train.

Van Horn v. Templeton et al., 11 La. Ann. 52

It follows, then, from the foregoing authorities, that an elevated railroad, in the event of an unreasonable delay, is bound to transport passengers either upon the same day or some subsequent day, to their point of destination, and therefore an ordinance which requires an elevated railroad to issue a delay check or ticket in such cases imposes no new duty upon such company, but is merely a regulation requiring the company to furnish some evidence of the existing duty which it owes passengers who have been delayed.

Coming now to the question of the power of the city to regulate street railways, ample authority can be found to justify such an ordinance as is proposed.

In *Union Traction Company v. City of Chicago*, 199 Ill. 484, 522, it was decided that street railways come within the purview and meaning of Clause 42 of Section 1 of Article 5 of the Cities and Villages Act empowering cities and villages to "license, tax and *regulate* hackmen, draymen, . . . and all others pursuing like occupations, and to prescribe their compensation," and that under the above clause a city by ordinance can compel a street railway company to give transfers from one of its lines to another, etc., as well as to fix the maximum rate of fare. The court quoting *Farwell v. City of Chicago*, 71 Ill. 269, as to an ordinance passed under this clause, said:

" 'The spirit of the ordinance is to bring the class of carriers therein named under the police regulations of the city. It is designed to operate upon those who hold themselves out as common carriers in the city for hire, and to so regulate them as to prevent extortion, imposition and wrong to strangers and others compelled to employ them. . . . This is a rightful exercise of the police power.' It has often been held that a street railway company is a common carrier of passengers for hire."

Section 4 of Chapter 66 of the Revised Statutes, known as the Horse and Dummy Act (1 Starr & Curtis' Ann. Statutes, p. 1263) provides that all grants to street railways to use the streets of a city shall be subject to the right of the city to control the use of the same to the same extent as if no grants had been made, and to make all necessary police regulations concerning the management and operation of such railways, whether such right is reserved in the grant or not.

Section 4 of the act of March 7th, 1899 (Starr & Curtis' Ann. St., Vol. 4, p. 1236) is a re-enactment of the above section of the Horse and Dummy Act, which is repealed thereby.

It is elementary law that a city cannot deprive itself by an ordinance or contract of its police powers.

City of Chicago v. Union Traction Co., 199 Ill., 259-270.

It seems clear that an elevated street railroad operated on or above the streets of a city, under an ordinance, is a street railway, so far as the right of the city to regulate it is concerned, for it is upon the street, though it is above the surface

of it. See *Matter of New York District Railway*, 42 Hun. 621 (affirmed 107 N. Y. 42) and *Doane v. Lake St. El. R. R. Co.*, 165 Ill. 510, 517; *Knopf v. Lake St. El. R. R. Co.*, 197 Ill., 212, 219, deciding that for purposes of taxation an elevated railway is not a street railway, does not conflict with the above rule.

In considering whether an ordinance is a proper exercise of any of the powers granted or reserved by the statutory provisions herein set out, it need not be shown that they are literally "necessary" to the health, safety, comfort or convenience of the public, as the word "necessary", as used in those provisions means "conducive", "expedient", or "reasonably convenient." *Wice v. C. & N. W. Ry. Co.*, 193 Ill. 351. And *Aurora & Geneva Ry. Co. v. Harvey*, 178 Ill., 477, 485.

In *Burdick v. The People*, 149 Ill., 600, 611, it is held that regulations affecting the conduct of such an employment as a railroad in the interest of the safety, convenience and comfort of passengers are fit subjects of legislative action.

Detroit v. Fort Wayne & B. I. R. Co., 95 Mich. 456, holds that an ordinance requiring tickets to be kept for sale upon street cars is within a reservation of power to make such rules and regulations from time to time as may be deemed necessary to protect the interests, welfare or accommodation of the public. See also *Sternberg v. State*, 36 Neb. 307, 19 L. R. A. 570.

A statute requiring railroads to maintain blackboards at stations and to write thereon the fact whether trains are on time has been held to be a constitutional police regulation. *State v. Indiana and I. S. R. R. Co.*, 133 Ind. 69, 18 L. R. A. 502.

In general, as to police regulations concerning the running of street cars, consult *State v. City of Trenton*, 53 N. J. L. 132; *South C. & C. S. R. Co. v. Berry*, 93 Ky. 43, 15 L. R. A. 604.

There is no room for doubt that from the time a person has paid fare and gone upon the platform of a station of an elevated railway station to take a train that he or she becomes a passenger.

Lake St. El. R. R. Co. v. Burgess, 200 Ill. 628, 631; see also

Central R. & B. Co. v. Perry, 58 Ga. 461; and

Rogers v. Steamboat Co., 86 Me. 261, 25 L. R. A. 491.

This being the state of the authorities, I am of the opinion that the City Council has the power by an appropriate ordinance to compel elevated railroads to issue a "delay check" or to return his fare to every passenger who may be unreasonably detained in trains or upon station platforms by reason of tardy train service, without regard to the cause of the delay, so long as it does not arise through the fault of the passenger.

To remove any question of unlawful discrimination it would appear wise that such legislation should be made to operate upon all street railways, whether surface or elevated.

Respectfully yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 10, 1904.

MR. R. B. WILCOX, Secretary Board of Inspection of Steam Boilers and Steam Plants.

Dear Sir:

Replying to your letter of the 8th inst., asking whether or not you have the power to prosecute for a violation of Section 20 of the ordinance governing the inspection of steam boilers and steam plants, I beg leave to advise you that in view of the grant of power by the Legislature to cities and villages, there is nothing unusual about this section of the ordinance. It requires those who sell, deal in or erect steam boilers, tanks, jacket kettles or generators, which are subject to inspection, to notify your board whenever the sale or delivery of such article is made within the city limits, giving the name of the owner and maker and the number and name of the street where such delivery or sale is made.

By Clause 67 of Section 1 of Article 5 of the Cities and Villages Act the city has the power to provide for the inspec-

tion of steam boilers; and by Clause 63 of the same article, the city has the power to prevent the dangerous construction and condition of boilers.

In view of these grants of power I am of the opinion that this section of the ordinance is valid and reasonable, and you may compel a compliance therewith.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 12, 1904.

W. H. MUSHAM, Fire Marshal.

Dear Sir:

Replying to your letter of the 10th inst., asking whether or not the Fire Department Trial Board would be guilty of contempt of the Federal Court if it should discharge a member of the department for refusal to pay, within a reasonable time, a just debt contracted while in the service of the department, in violation of its rules and regulations, when such member has been discharged of such debt by bankruptcy proceedings; and if such member would be entitled to reinstatement because of such discharge in bankruptcy, I beg leave to advise you that Rule 302 of the Rules and Regulations of the department provides that a member may be discharged for "neglect to pay, within a reasonable time, a just debt incurred while in the service."

Any member guilty of a violation of this rule may be discharged, regardless of any action taken by the Federal Court under the bankruptcy law. In such case the board will not be guilty of contempt of such court, and such proceeding in bankruptcy will not entitle the member to reinstatement. The board might, however, be justified in taking into account the bankrupt condition of the member, so far as it bears on

the question of what would be a "reasonable time" for the payment of the debt.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 12, 1904.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

On the 8th of February last, your Honorable Body passed the following order (pp. 2196 and 2197 of Council proceedings of said date):

"ORDERED, further, that the Corporation Counsel be directed to inform this Council regarding the right of the city to compel elevated railroads to make arrangements for passengers in case of delay or emergency, to pass safely from trains between stations to the elevated railroad platforms, by means of portable walks across the tracks, and emergency stairways or ladders leading from the track level to the elevated platforms."

The above order was passed in connection with another order, concerning which an opinion has already been rendered by this department. Among the powers vested in the City Council under Article V., Section 1 of the Cities and Villages Act, are the following:

Ninth. To regulate the use of the streets;

Twentieth. To regulate traffic upon the streets;

Twenty-seventh. To require railroad companies to provide protection against injury to persons;

Forty-second. To regulate hackmen, draymen and others pursuing like occupations;

Sixty-six. To regulate the police of the city and pass and enforce all necessary police ordinances.

If the City Council has the right to pass an ordinance embodying the requirements mentioned in the order quoted, it

possesses this right under the foregoing powers. The statutes in this State imposing upon railroad companies the duty to fence their roads and construct farm crossings for the use of owners of land adjoining their tracks, have been sustained as constitutional and valid, not only as to future but also as to existing railroads and tracks under the police power. (*I. C. R. R. Co. v. Willenborg et al.*, 117 Ill. 203; *C. & N. W. Ry. Co. v. City of Chicago*, 140 Ill., 309, 319; *P., F. W. & C. Ry. Co. v. Chicago*, 159 Ill. 369; *T. W. & R. Co. v. City of Jacksonville*, 67 Ill. 37; *Kan. Pac. Ry. Co. v. Mower*, 16 Kan. 573.)

An ordinance requiring guard wires for electric wires wherever the latter cross other electric wires, has been upheld as a valid exercise of police power. (*State ex rel. Wis. Tel. Co. v. Janesville S. R. Co.*, 87 Wis. 72, 22 L. R. A. 759.)

It was also held in the case of *North Chicago City Railway Co. v. Lake View*, 105 Ill. 183, that a city organized under the general law can, under its police power and its power over nuisances, pass an ordinance requiring a street railway company to make its track conform to the requirements of the ordinance so as to enable wagons and other vehicles to pass over the track without inconvenience or danger.

Upon the principle of the above cases I am of the opinion that an ordinance may be passed by the City Council compelling elevated railroads operating their tracks either over the streets or over private property so to equip their tracks and other structures as to furnish, in cases of delay or danger, a safe and convenient means of passing from their trains, between stations, to their tracks and from the tracks to the station platforms.

Such an ordinance should be really conducive to the public safety, and if it is proposed to require sidewalks running along or between the tracks upon elevated railway structures between stations, the sidewalks should be furnished with hand rails or similar guards to protect passengers making use of the walks.

The enclosing or boxing of "third rails" would also appear necessary. As is well known, these "third rails" upon elevated railways furnish the motive power which operates the cars, and the current of electricity which passes through them

is so strong as to imperil the lives of those coming in contact with them. The fact that the equipment of the tracks, structures, platforms and "third rails" of elevated railways with safety devices would impose financial burdens upon the railway companies would not render an ordinance commanding such equipment unreasonable.

The reasonableness of an ordinance passed for the protection of the public safety is not to be measured by dollars. If an ordinance does not interfere with the operation of elevated railways to a greater extent than the public safety demands, it is reasonable.

Respectfully yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 12, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Replying to your letter of February 20th, with stated enclosures, regarding the claim of E. S. Garnham for witness fees while in attendance at trials before the Civil Service Commission, in which you ask whether or not the city is liable for witness fees where the person is not a city employe, and, if so, by whom the bill should be paid, I beg leave to advise you that by Section 12 of the Civil Service Act, the Civil Service Commission is given the power to secure, by subpoena, both the attendance and testimony of witness; and by Section 33 of said act, it is provided, among other things, that "The fees of witnesses for attendance and travel shall be the same as the fees of witnesses before the Circuit Courts of this State, and shall be paid from the appropriation for the expenses of the commission." By Section 47 of Chapter 53 of the Revised Statutes, the fees of witnesses in courts of record are provided for as follows: "Every witness attending in his own county upon trials in the courts of record shall be entitled to receive

the sum of \$1.00 for each day's attendance, and five cents per mile each way for necessary travel."

If the claimant is not a city employe, and resides in this county, he is entitled to receive the sum of \$1.00 for each day's attendance at trial before the Civil Service Commission, and five cents per mile each way for necessary travel, and such expense should be paid out of the appropriation for said commission.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 12, 1904.

MAX EBERHARDT, Esq.,

Police Magistrate Warren Avenue Station, Chicago.

Dear Sir:

You have asked this department to render an opinion as to how prosecutions under the dram shop ordinance of the Town of Cicero shall be instituted, and in whose name.

Section 18 of the Annexation Act, adopted April 25th, 1889 (Starr & Curtis, Annotated Statutes, Chapter 24, page 805, paragraph 235) provides that:

"When a part or the whole of an incorporated town, city or village is annexed, under the provisions of this act, to another city, village or town, and prior to such annexation an ordinance was in force prohibiting the issuance of licenses to keep dram shops within said territory so annexed, or any part thereof, or providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dram shops, then such ordinance shall continue in full force and effect, notwithstanding such annexation. . . . It is intended by this section to continue in full force and effect all ordinances of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dram shops is prohibited or regulated within said city, village or

incorporated town, or any part thereof, without the voters of the territory so affected consent, as hereby provided, to the repeal of such ordinance of the city, village or incorporated town to which the territory is annexed."

Certain parts of the Town of Cicero were annexed to the City of Chicago under the provisions of the Annexation Act, of which the foregoing section is a part. At the time of annexation there were in force within the Town of Cicero certain ordinances relating to the prohibition and regulation of dram shops. By virtue of the annexation, such parts of the Town of Cicero became a part of the City of Chicago, and such ordinances of the Town of Cicero became a part of the ordinances of the City of Chicago, but applicable only to that part of the City of Chicago which had formerly constituted a part of the Town of Cicero.

By Paragraph 270, Chapter 24, Starr & Curtis Annotated Statutes, page 814, it is provided:

"That all actions to recover any fine, or to enforce any penalty under any ordinance of any city or village in this State shall be brought in the corporate name of the city or village as plaintiff."

The ordinances of the Town of Cicero relating to dram shops will be found as Chapter 35 of a compilation entitled "Charter and Revised Ordinances of the Town of Cicero, 1897."

For any violation of said ordinances committed within that part of the City of Chicago which was formerly a part of the Town of Cicero, the prosecution should be brought in the name of the City of Chicago as plaintiff, and the charge should be based on the section of Chapter 35 of the Revised Ordinances of the Town of Cicero, which has been violated. It would probably be well to have it stated in the complaint that said section has become a part of the ordinances of the City of Chicago by virtue of Section 18 of the Annexation Act.

It is to be noted, however, that anyone selling liquor in the territory in question, without a license, would be punishable under Chapter 39 of the Revised Code of Chicago of 1897, and it seems to me that cases where it would be necessary to

base a charge upon an ordinance of the Town of Cicero would be very rare.

Yours truly,
 WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

MARCH 15, 1904.

CHARLES WERNO, Esq., Chairman Judiciary Committee, City Council.

Dear Sir:

In your favor of recent date addressed to the Corporation Counsel, you requested the opinion of this department as to the validity of a proposed ordinance limiting the hours of employment of drug clerks, and transmitted therewith various data and letters bearing thereon.

The ordinance as originally drafted was, in my opinion, clearly invalid for numerous reasons, and those interested in the subject, conceding the correctness of this view, had a new ordinance introduced into the City Council which was also referred to your committee. This latter ordinance reads as follows:

“Be it ordained by the City Council of the City of Chicago: Section 1. As a measure for the protection of the public health, it shall be unlawful for any person engaged in the business of compounding, recommending, dispensing or selling, at retail, within the limits of the City of Chicago, drugs, medicines or poisons, to work, or for any employer of such person to permit or compel such person to work, at such occupation, a greater number of days than six days in each week; and ten consecutive hours shall constitute a day's work.

“Section 2. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

“Section 3. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars (\$25) and not more than two hundred dollars (\$200).

or by imprisonment not exceeding ninety days, or by both such fine and imprisonment."

There is nothing in the proposed ordinance, under a proper construction of it, showing any real relation to the public health or safety, except the bare statement at the beginning of Section 1 that it is a measure for the protection of the public health. It contains no provision as to the number of consecutive hours a drug clerk may work. Under the provisions of the proposed ordinance he might work sixty consecutive hours, and rest the balance of the week. It cannot be claimed that such an arrangement would be conducive to the health or safety of the clerk or of the public.

If it be supposed that the word "day" as used in Section 1 means the ordinary day of twenty-four hours, then giving to the ordinance the most liberal construction allowed by the authorities, it means that it only requires one day of rest in each week, and that, in the absence of special contract, ten *consecutive* hours shall constitute a day's work, but leaves the parties to contract for any number of hours' work per day, whether consecutive or not. (*United States v. Martin*, 94 U. S. 400, and *Fiske v. The People*, 188 Ill. 206.) To construe the ordinance otherwise is to make it void, as hereinafter shown.

Giving to the ordinance the construction above stated, it can hardly be said that the public health, or the health of drug clerks, is *fairly* connected with it, inasmuch as the drug clerk, while guaranteed one day's rest in each week, may work any number of hours during the remainder of the week. The main part of the ordinance restricting the number of days' work, which expresses the purpose of its enactment, falls, then, under the ban of *Eden v. The People*, 161 Ill. 296, and what remains amounts to a mere definition of a day's work and a meaningless penalty, and is so dependent upon the invalid portion, that it must fall with it. (*Fiske v. The People*, 188 Ill. 206; *Kellyville C. Co. v. Harrier* (Ill. 1904), 69 N. E. 927; *Low v. Rees Printing Co.*, 41 Neb. 127.)

In the *Eden* case, the court decided that a barber was deprived of property without due process of law by a statute making it unlawful for him to do business on Sunday where

it does not apply to any other class of business, and the statute could not be held valid under the police power. See also *Kellyville C. Co. v. Harrier*, *supra*; *Denver v. Bach* (Colo. 1899), 46 L. R. A. 848, 58 Pac. 1089. Yet, like statutes have been sustained in other States. (*People v. Havnor*, 149 N. Y. 195; *Petit v. Minnesota*, 177 U. S. 164, 74 Minn. 376; *Ex parte Northrup* (Or. 1902).

It is plain under the Illinois cases that section one of the ordinance herein set out (or any similar ordinance), deprives the clerk, or employe, and the employer, of liberty and property (the right to labor and to contract for labor) without due process of law, unless the police power can be relied upon to rescue it from the constitutional inhibitions. See *Ritchie v. People*, 155 Ill. 98; *Gillispie v. The People*, 188 Ill. 176, and *Kellyville Coal Co. v. Harrier* (Ill., Feb. 17, 1904), 69 N. E. 927.

It has, however, already been shown that this ordinance cannot be upheld as a valid exercise of the police power. I am of the opinion then, that the particular ordinance submitted is invalid for the reasons above stated.

In your letter asking for an opinion as to the validity of the particular ordinance transmitted, you stated that your committee desired information as to the power of the City Council to regulate the hours of employment of drug clerks by a *proper ordinance*, so I will take up the following questions:

First. Can legislation prohibiting clerks or other employes from working, or employers from permitting them to work more than a limited number of hours each day be sustained under the police power?

Second. Is it a lawful exercise of the police power to limit by legislation the number of consecutive hours which a drug clerk shall work (a) in the interest of his own health or (b) in the interest of the public health or safety?

The discussion of these questions demands a somewhat extended review of the authorities because of the comparative novelty and great importance of the principles at stake, and because of the need of contrasting the Illinois decisions with those in other States.

In many States statutes providing that eight hours shall constitute a day's work for laborers employed by or on behalf of the State or municipality therein, etc., have been sustained as a direction of the State to its agents, even though penalties are provided for permitting such laborers to work for a longer period. (*Re Dalton (Kan.)*, 47 L. R. A. 380; *Atkin v. Kansas*, U. S. Sup. Ct. at Oct. term, 1903.) But it is now the settled law in this State that a provision in a statute, ordinance or contract for a public improvement, made by special assessment, prescribing that eight hours shall constitute a day's work in making such improvement and making the contractor liable to a forfeiture of the contract if he permits his servants to work longer, is void as infringing the right of free contract. (*Fiske v. The People*, 188 Ill. 206; *Glover v. The People*, 201 Ill. 549; *McChesney v. The People*, 200 Ill. 146; *Wells v. The People*, 201 Ill. 435, 441; *Sweet v. The People*, 200 Ill. 536.) See also: (*Ex parte Kuback*, 85 Cal. 274; *City of Cleveland v. Construction Co.*, 67 O. St. 197; *People ex rel v. Coler*, 166 N. Y. 1, *In re Preston*, 63 O. St. 428; *People ex rel. Treat v. Coler*, 166 N. Y. 144; *State ex rel. v. Norton*, 5 Ohio N. P. Rep. 183.)

In *City of Cleveland v. Construction Co.*, *supra*, it was held that such a statute is not a valid exercise of the police power, it not appearing that the services and labor to be performed were unlawful or against public policy, or that they were of *such a character* that such limitation and restriction as to the number of hours' labor, etc., was *necessary* to the public welfare.

The *Eden case* has already been contrasted with the decisions in other States.

It is now proposed to take up the authorities bearing upon the first question.

In the leading case, *Ritchie v. The People*, 155 Ill. 98, the court held that the right to labor or employ labor and make contracts in respect thereto is *both a liberty and a property right*, and is included in the guaranty of Section 2, Article 2, of the Constitution, that no person shall be deprived of life, liberty or property, without due process of law, and that:

"Statutes must not conflict with the constitution, and

where their ostensible object is, to secure the public comfort, welfare or safety they must appear to be adapted to that end, and cannot invade the rights of persons and property under the guise of a police regulation."

In the opinion it was said:

"But aside from its partial and discriminating character, this enactment is a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties. It substitutes the judgment of the legislature for the judgment of the employer and employee in a matter about which they are competent to agree with each other. It assumes to dictate to what extent the capacity to labor may be exercised by the employee, and takes away the right of private judgment as to the amount and duration of the labor to be put forth in a specified period. When the legislature thus undertakes to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, it transcends the authority entrusted to it by the constitution, even though it imposes the same burden upon all other citizens or classes of citizens. General laws may be as tyrannical as partial laws."

"The question here is not whether a particular employment is a proper one for the use of female labor, but the question is whether, in an employment which is conceded to be lawful in itself and suitable for woman to engage in, she shall be deprived of the right to determine for herself how many hours she can and may work during each day. There is no reasonable ground—at least none which has been made manifest to us in the arguments of counsel—for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow. But the police power of the State can only be permitted to limit or abridge such a fundamental right as the right to make contracts, when the exercise of such power is *necessary* to promote the health, comfort, welfare or safety of society or the public; and it is questionable whether it can be exercised to prevent injury to the individual engaged in a particular calling."

Tiedemann in his work on Limitations of Police Power, says:

"In so far as the employment of a certain class in a particular occupation may threaten to inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of their trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. . . .

There can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the State to prohibit men from working in the manufacture of white lead because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron smelting works, because the lives of the men so engaged are materially shortened."

And the court further said, adopting the language of *In re Jacobs*, 98 N. Y. 98:

"When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law (section) and we must, therefore, pronounce it unconstitutional and void."

In the case of *In re Morgan*, 26 Colo. 415, the following extract from the opinion of Judge Christiancy in *People v. Jackson, etc., R. Co.*, 9 Mich. 285, is quoted with approval:

"Powers, the exercise of which can only be justified on this specific ground (that they are police regulations) and which would otherwise be clearly prohibited by the Constitution, can be such only as are clearly necessary to the safety, comfort or wellbeing of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case notwithstanding the language of the prohibition would otherwise include it."

The same quotation is adopted in Tiedemann on State and Federal Control of Persons and Property (Vol. 1, p. 76). See also Cooley's Const. Lim. (6th Ed.), p. 711.

In the *Morgan case* the court referred to *Palmer v. Tingle*, 55 O. St. 423, saying:

"In reply to the argument of counsel, who claimed the most sweeping power of the legislature in restricting the right of contract when the general good requires it, the court said: 'It may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare, and equal protection and benefit of the people, must appear, not only to the general assembly, by force of popular clamor or the pressure of the lobby, but also to the courts; and it must be so clear that a court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people.' To the same effect, see *John Spry Lumber Co. v. Sault Sav. Bankj Loan & T. Co.*, 77 Mich. 199, 6 L. R. A. 204."

The *Morgan case* contains a complete and elaborate review of the later cases and the decision follows the *Ritchie case* and other Illinois decisions. In *Wice v. C. & N. W. Ry. Co.*, 193 Ill. 358, it was said:

"Fundamental principles secured by fundamental laws of the State cannot be departed from with safety, especially those affecting personal liberty. 'A frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.' (Const. 1870, Bill of Rights, Sec. 20.)"

See also *Low v. Rees Ptg. Co.*, 41 Neb. 127. (*Braceville Coal Co. v. People*, 147 Ill. 66; *Booth v. The People*, 186 Ill. 43, 49; *State v. Goodwill*, 33 W. Va. 179; *Kellyville Coal Co. v. Harrier*, *supra*; *Mathews v. People*, 202 Ill. 389, 401; *Fiske v. People*, 188 Ill. 206; *In re Jacobs*, 98 N. Y. 98; *T. W. & W. R. Co. v. City of Jacksonville*, 67 Ill. 37; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789; *Johnson v. Goodyear* (Cal. 1899), 59 Pac. 304; *City of Cleveland v. Construction Co.*, *supra*.)

The leading text writers upon the subject of the police power approve the principle of the *Ritchie* and *Morgan* cases. See Russell on Police Powers, p. 65, 66 and 167, Brannon's Fourteenth Amendment, p. 112, 118; Tiedemann on State and Fed. Control of Persons and Property, Vol. 1, p. 76, 335, and see *Wenham v. State* (Neb. 1902), 91 N. W. 421.

The leading case on the subject of limitations upon the police power, *In re Jacobs*, 98 N. Y. 98, decides that the law will not permit property rights to be invaded under the guise of a police regulation for the promotion of health when such is manifestly not the purpose of the regulation. It must in fact be a police law. See also *Bailey v. The People*, 190 Ill. 28; *Ruhstrat v. People*, 185 id. 133; *Eden v. The People*, 161 id. 296; *T. W. & W. R. Co. v. City of Jacksonville*, 67 id. 37, and *Ritchie v. People*, 155 id. 98.

In the *Jacobs* case it was said:

"Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabrics, and usually deranges the delicate and complicated machinery of industry and causes a score of ills while attempting the removal of one."

See also *State v. Speyer*, 67 Vt. 502, *ex parte Whitwell* (Cal.), 19 L. R. A. 727, and *Jew Ho v. Williamson*, 103 F. 10.

Upon the authority of the *Ritchie* case and those cases last cited, I think it may be said that in Illinois, legislation infringing upon such fundamental rights of the individual as the right to fix for himself his hours of labor, cannot be supported under the police power simply because it is conducive to the health of a certain class of workmen or employes.

The contrary doctrine prevails in some of the States, and also in the Federal Supreme Court. (*Holden v. Hardy*, 169 U. S. 366, and *St. Louis Coal Co. v. Illinois*, 185 U. S. 203.) But the decision of the Supreme Court of the United States holding that a limited hour law of a certain State does not violate the Federal Constitution, in no way binds the courts of another State in construing the validity of such a law under the Constitution of that State. (*In re Morgan*, 26 Colo. 415.)

It is true that a statute requiring the inspection of mines (as well as similar legislation) has been sustained by our courts as valid under the police power, because the health of miners is thereby protected (*C. W. and V. Coal Co. v. The People*, 181 Ill. 270), but it is to be observed that the Constitution specifically directs the enactment of such laws (Const. 1870, Art. IV, Sec. 29), and it has been held that even such a constitutional provision will not authorize a statute limiting miners to a working day of eight hours, and that legislation to protect a citizen against the consequence of his own acts is not within the constitutional exercise of the police power. (*In re Morgan*, 26 Colo. 415.)

The ordinary criterion applied to a law which must derive its validity from the police power, is whether it tends towards the preservation of the public health, safety or welfare. It must be apparent that this is the end actually intended, and there must be a direct connection between the law and the public health, safety and welfare. (*City of Chicago v. Netcher*, 183 Ill. 104; *Wilkie v. City of Chicago*, 188 id. 444; *Booth v. The People*, 186 Ill. 43, 49, and *In re Jacobs*, 98 N. Y. 98.) Statutes requiring that street cars be furnished with shields or screens during the winter months to protect the motorman, etc., upon the cars, have been upheld under the police power, for the reason that if the employes operating the cars become benumbed from the cold, passengers may be exposed to danger, and the public, therefore, is interested in the health of the employes. (*State v. Hoskins* (Minn.), 59 N. W. 545, and *State v. Whitaker*, 160 Mo. 59.)

In *People v. Phyfe*, 136 N. Y. 554, speaking of limiting the working hours of railroad employes, it was said (but it was *not* decided) that:

"In view of the great danger to and even destruction of life and property which might result from the attempt of men who have become enfeebled by prolonged and exhausting effort to control energies and cars when in motion, it might be claimed that it was within the province of the legislature to enact such a law, and make the violation of it a crime; that it was a reasonable exercise of the police power of the State; and also a lawful assertion of its reserved right to regulate corporations of this character in their relations to the public."

In the very recent case of *People v. Lochner* (N. Y., Jan. 24, 1904), 69 N. E. 375, a section of the law relating to bakeries, which provided that no employe in such an establishment should be *required* to work more than sixty hours in any week, nor more than ten hours a day, etc., was declared to be a valid exercise of the police power relating to the public health. There were five other sections of the bakery law relating to drainage, plumbing and ventilation of buildings; to the utensils and furniture used therein and the methods of inspecting, repairing and using buildings occupied as bakeries. Four of the seven judges decided in favor of the law, the other three judges dissenting.

The *Lochner case*, however, runs counter to the current of the Illinois decisions and cannot be regarded as an authority in this State.

In no State has any law been sustained by the courts, even under the police power, which simply restricted the hours of labor. In the *Phyfe* and *Lochner cases* decided in New York, the statutes construed dealt with the subject of safety or health generally, and the provisions prescribing working hours were merely component parts of a general and comprehensive regulation of a particular occupation or business.

It is apparent from the cases so far considered that the Illinois court in all classes of limited hour cases has resisted all attempts at infringement upon the unfettered right of contract, and the decisions likewise make it appear that limited hour legislation is always supported by its advocates as a legitimate exercise of the police power.

As is pointed out in the *Ritchie case*, the precise amount of daily labor that an individual can endure without injury is

a matter impossible of demonstration. Unless there is some method of at least approximating the capacity of the average man for daily or continuous labor, any attempt by a legislative body to arbitrarily establish a standard appears to be an unreasonable restraint upon individual liberty and an unjustifiable substitution of legislative for individual judgment.

I conclude, then, that the first question should be answered in the negative.

We now come to the first branch of the second question, which relates to the right of legislative bodies, in the interest of the health of an employe, to place a limit upon the number of hours such employe may work consecutively. This branch of the second question has already been practically disposed of by the extract hereinbefore quoted from the *Ritchie case* and by the authorities following, especially the *Morgan case*. It is only necessary to add that the courts of this State do not seem inclined to endorse officious regulations designed to protect the health or safety of the individual from his own greed or folly.

A law requiring that a drug clerk, an engineer or a motorman shall neither work nor be allowed to work more than a limited number of hours consecutively, say, seven or eight hours, for example, without a respite, might well be declared a valid police law. Such a law might be claimed to be not only conducive to but necessary to public health and safety. Its relation to the police power would be apparent and it would bear the badge of sincerity upon its face. It would interfere little, if at all, with the rights of liberty and property, leaving the employer and employe to make their own contract as to hours of labor and rates of wages.

Wheeling Bridge & T. Co. v. Gilmore, 8 Ohio Cir. Ct. 658, was a suit by a telegraph operator employed by a railroad for compensation for extra services performed by him in working more than ten hours a day. The statute provided that ten hours a day should constitute a day's work, and that recovery should be had for excess work. The statute was held invalid under the Constitution of Ohio and the United States. The court said (p. 666) :

"We do not doubt the authority of the legislature to for-

bid a railroad company from requiring any of its servants engaged in running its trains upon the road, or telegraph operators in active duty at its stations, who have worked in their respective capacities for twenty-four consecutive hours, to again go on duty until they have had at least eight hours' rest, as that would be a wise police regulation. But the absolute prohibition in this act is of that paternal class that destroys alike all the constitutional guarantees of liberty of action, the security of property and the equal protection of the laws—an infringement at once of the rights of the employe as well as those of the employer."

As a summing up of the foregoing pages, I would say then: *First.* That the particular ordinance submitted is invalid. *Second.* That any ordinance prohibiting drug clerks from working, and their employers from permitting them to work, more than a given number of hours per day, cannot be sustained under the police power, either upon the ground that such ordinance will promote the health of the clerks or the public health or safety, except as hereinafter stated. Its invalidity, as a police measure, arises from the fact that the connection between the public health and the end accomplished by such an enactment is too remote and it does not reasonably tend towards benefiting public health. *Third.* The City Council may, however, exercise the police power delegated to it by the State by requiring by ordinance that in the interest of the public health and safety no person employed in an occupation related to the public health or safety (e. g. the compounding of prescriptions) shall work or be compelled to work more than a certain number of consecutive hours without rest, providing the number of hours of labor and of intermission are reasonably fixed and reasonably related to the object to be accomplished, to-wit, the safety of the public.

Very truly yours,

MACLAY HOYNE,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

MARCH 16, 1904.

FREEMAN K. BLAKE, ESQ., Chairman Special Committee of
City Council on Buildings of Class IV.

Dear Sir:

I have your favor of the 15th inst., requesting my opinion upon the construction of that section of the ordinance relating to buildings of Class IV, which provides that there must be two separate flights of stairs, each four feet wide, leading from the hall to the ground level. You state that the construction of this section has arisen in the committee in a number of cases, where the hall had but one flight of stairs leading to the ground, of a width of eight or more feet. The specific questions submitted by you are:

First. In cases where a single flight of stairs eight feet wide leads from the hall to the ground, could a fireproof partition be built in the middle of the flight of stairs so as to make two stairways and constitute two flights of stairs, within the meaning of this section of the ordinance?

“Second. In case a hand railing was constructed in the middle of the eight foot flight of stairs leading from the hall to the ground, would this constitute two flights of stairs, within the meaning of this section of the ordinance?”

Quoted Section 11 of Section 1 of the ordinance of January 18, 1904, amending the ordinance relating to the Department of Buildings and governing the erection of buildings, etc., in the City of Chicago, passed March 28, 1898, and all subsequent amendments thereto, reads as follows:

*“Limitations of Floor Levels of Class IV.—Auditorium Floor of Class IV.—Height above Sidewalk.—*The following exception to above limitations of floor levels in buildings of Class IV shall be observed in all cases of new construction or alteration or improvement of existing buildings.

“In buildings of Class IV no auditorium of a larger seating capacity than 1,000 shall have the highest part of its main floor at a greater distance than eight feet above the adjacent sidewalk grades. No room of any building of Class IV of larger seating capacity than 500 shall be at a greater distance from the sidewalk grade than thirty feet. No room of Class

IV of larger seating capacity than 200 shall be at a higher level above the sidewalk grade than forty-five feet.

"The only exception to the foregoing shall be the case of rooms of buildings of Class IV of a seating capacity less than 500, which, in fireproof buildings, may be located in any story thereof, but in such case there shall be at least two flights of stairs from the floor in which such audience room or auditorium of Class IV is located, to the ground, each of which stairs shall be not less than four feet wide in the clear."

See page 2059, current printed council proceedings.

February 29, 1904, the City Council amended the first paragraph of the foregoing Section 11 so as to read:

"The following limitations of floor levels in Class IV shall be observed in all cases."

See page 2374, *id.*

The subject under discussion is contained in the last paragraph of said Section 11, and, as I stated before your committee on two occasions, my opinion is that the said section contemplates two separate and distinct stairways from the floor, in which the audience room or auditorium of Class IV is located, to the ground, each of which stairways shall be not less than four feet wide in the clear, and therefore both of the foregoing specific questions should be answered in the negative.

I also stated to your committee that, while said section could not be otherwise construed, your committee had the power, if it so wished, to suggest an amendment to the City Council, legalizing existing buildings of this class which did not have the stairways required by the ordinance, but which had one stairway eight or more feet in width, leading from the audience room or auditorium to the ground.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 17, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Almost immediately after the passage of the ticker ordinance you called my attention to the fact that the provisions of that ordinance were being evaded by the substitution of telephones for tickers, as gambling devices for the dissemination of betting odds and racing news and for the placing of bets on horse races, and you then requested an opinion as to the existence of a legal remedy in the premises.

This device for the evasion of the law is of such recent invention that it has never come before the courts, and, in the nature of things, no utterance of the courts can be referred to bearing directly upon the matter. It must therefore be disposed of in the light of established principles and without much aid from precedents. It has also been impossible to outline any definite and practical method for the prevention of this evil until a sufficient length of time expired for the ascertainment, in at least a general way, of the methods employed. It now seems that the general course employed is somewhat as follows:

Clearing houses are established, connected by telephone with exchanges, and these exchanges are equipped with telephone connections to saloons and other places where tickers were formerly in operation. Racing news from outside of town is sent by telegram to the clearing house or clearing houses, some within and some without the city, forwarded from the clearing house to the exchanges, and from the exchanges to the saloons and other places. Bets are taken by representatives of bookmakers and transmitted through these telephones to the exchanges and thence to the clearing houses. The telephones thus used are not registered in the telephone directory and are reserved for this exclusive purpose. This is a mere outline of the general method employed, subject in individual cases to material modification in detail.

This evil is to be met and combated in three general ways: First, by the use of the police force and the police courts, by raids and by prosecutions, treating these bookmaking enterprises like common gambling houses; second, by the use of

the general police power, by locating the telephone wires over which this unlawful business is conducted, and cutting the wires, thus preventing the continuance of the business; third, by appealing to the courts for process of injunction, directed to the telephone company, enjoining it from renting telephones for use in connection with these gambling enterprises, and from suffering and permitting them thus to be used, and from maintaining the telephones in connection with their exchange or allowing any service to be rendered over them after the fact has been established that they are used for such unlawful purposes.

I have not yet been able to find any decisions controlling upon the question of whether or not the telephones themselves could be destroyed by the police during the course of such raids. They are not described in the statutory enumeration of property contraband of law, but I am strongly inclined to the opinion that, under the circumstances above outlined, they partake of the nature of gambling implements, and that the provisions of the act with regard to search warrants (Paragraph 4, Section 2, and Sections 3 to 7, inclusive, Div. VIII, Criminal Code) authorize their seizure and detention until after the prosecution and their destruction after the trial.

With regard to the remedy by injunction, I am prepared, if you so direct, to draw and file a bill, praying that the Chicago Telephone Company be restrained from aiding and abetting in the business of gambling on horse races and from tolerating the use of their instruments for that purpose. The technicalities of the criminal law are such that the remedy by prosecution, although effective in the end, is slow and cumbersome. The remedy by injunction, however, would, in my opinion, materially aid. Its effect would be that on presentation to the telephone company of evidence, which, although it might fall short of being sufficient for a criminal conviction, was adequate to reasonably establish the fact that the telephone was used for an unlawful purpose, the company

would be compelled to disconnect and remove the instrument under penalty of punishment for contempt.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

MARCH 18, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In reply to your request for information in regard to the operation of the tracks in Michigan avenue, laid under the authority of an ordinance granted to the Chicago Passenger Railway Company, I beg leave to report:

The ordinance for the operation of a street railway on Michigan avenue, from Adams street to Washington street, was passed February 1, 1886, and accepted by the Chicago Passenger Railway Company on March 8, 1886, and its duration was twenty years from the passage thereof. The ordinance rights, therefore, expire on February 1, 1906.

These tracks have heretofore been operated in conjunction with tracks on Adams street, from Michigan avenue to Clark street, constructed under the authority of an ordinance passed April 8, 1886, and accepted by the Chicago Passenger Railway Company on May 10, 1886; duration, twenty years from the passage of the ordinance; expiration, April 8, 1906. The grantee in these ordinances is a corporation organized under the general act, and the so-called "Ninety-nine Year Act" can have no possible effect upon these ordinances.

In accordance with your verbal request to ascertain whether or not the impression which you had gained from the appearance of the track in question, after one of the heavy falls of snow last winter, to-wit, that the tracks were not actually in use any longer, even for a daily "ghost car", was correct, I have made inquiry of the doormen of the Chicago Athletic Club, whose post of duty is at such a point as to give them special opportunities for knowledge, and they inform me that the "franchise" or "ghost" cars were operated by horses there, intermittently, until the street was repaved with asphalt last fall, and perhaps once or twice thereafter,

but that during the winter, at least since the snow began to fall, no car whatever has been operated upon the tracks in question, in front of the Athletic Club house, or on any part of Michigan avenue between Adams and Madison streets. In order to make accurate proof of non-user for at least one complete period of twenty-four hours, I detailed Investigators W. H. Clark and Edgar Theriault, of this office, to make a personal watch from 6 o'clock a. m. to 6 o'clock p. m. of March 15, 1904, in conjunction with Officer Michael O'Brien detailed by Lieutenant Duffy, who watched from 6 o'clock p. m. of March 15th to 6 o'clock a. m. of March 16, 1904. The report of Officer O'Brien and the affidavits of said investigators are herewith submitted, and show that no cars were operated during said twenty-four hours. The report of Officer O'Brien covers also Adams street, from State street to Michigan avenue.

In addition to this formal proof, I am advised that an abundance of evidence can be had that no cars have been operated since the first heavy snow fall of last winter, on any part of Adams street east of State street or on any part of Michigan avenue between Adams and Madison streets.

The chief consideration of any grant of the privilege of constructing and operating street railways in the public streets of the municipality is the performance of the public service, consequently a failure to operate forfeits the rights of the company. (*Citizens Street Railway Co. v. Jones*, 34 Fed. 579; *State v. East Fifth Street Railway Co.*, 140 Mo. 539.) Failure to operate for a considerable length of time gives rise to the presumption of abandonment. (*Louisville T. Co. v. Cincinnati*, 76 Fed. 296.) A mere colorable operation is not sufficient. (*Snouffer v. Cedar Rapids, etc., Railway Co.* (Iowa, 1903), 92 N. W. 79.)

I am therefore of the opinion that you have the right to prevent the operation of street cars by the Chicago Passenger Railway Company on that portion of Adams street east of State street, and on that part of Michigan avenue between Adams and Madison streets, using for that purpose the police force or such other measures as may seem to you to be reasonably necessary to accomplish the prevention of the use of

such tracks, and that you also have the power to cause said tracks to be taken up and removed from the street.

In view of the fact, however, that the property of the Chicago Passenger Railway Company has been leased to the Chicago Union Traction Company, and is constructively in the possession of the Federal receivers, I should not advise the tearing up of the tracks without a conference with the receivers and, if necessary, the submission of the matter to Judge Grosscup by a petition. This petition should be filed with due reservation of our objections to the jurisdiction of that court over the subject matter, submitting the city's statement of its position to the court as a matter of comity and courtesy only.

Very respectfully,
EDGAR B. TOLMAN,
Corporation Counsel.

MARCH 18, 1904.

MR. EDWARD M. LAHIFF, City Collector.

Dear Sir:

I have your communication of the 12th inst. requesting the opinion of this department as to whether an applicant for a saloon license can re-open a saloon, closed December 31, 1903, at this date in the Hyde Park district without securing a new petition signed by a majority of the property owners according to frontage on both sides of the street in the block, and also a majority of householders, persons or firms living or doing business on each side of the street in the block upon which such dram shop should be located.

The ordinance of the Village of Hyde Park (Section 2085 of the Revised Code of Chicago, 1897), provides as follows:

"Any person who shall desire to obtain a license to keep a saloon or dram shop shall, in addition to the requirements now provided by ordinance, present his application in writing to the Village Comptroller for such license, in which shall be stated the name of the person or firm to whom the license is to be issued and the place where such saloon or dram shop is to be kept, which application shall be signed by a majority of the property owners, according to frontage on both sides of

the street in the block upon which such dram shop is to be kept, and shall also be signed by a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which such dram shop shall have its main entrance: Provided, however, that any person or firm who shall have made application as aforesaid, and received a license to keep a dram shop shall not be required to present an application as above in order to obtain a renewal of the license to himself or firm unless at least one-quarter ($\frac{1}{4}$) of the property owners or bona fide householders, persons and firms doing business upon both sides of the street in the block upon which the said dram shop has its main entrance, shall file with the Village Comptroller, at least thirty (30) days prior to the time for the renewal of such license, a notice stating that the signers thereof object to the granting or renewing of the license to said person or firm. Upon receiving such notice the Village Comptroller shall notify the Captain of Police that such notice has been filed and the Captain of Police shall at once notify or cause to be notified the holder or holders of the license. But a failure to give such notification shall not be construed as a waiver of the necessity for filing the application as provided above."

Section 1178 of the Revised Code of Chicago, 1897, provides:

"The license year, from and after the passage of this ordinance, is hereby divided into three periods, as follows: From May first to August thirtieth, inclusive, shall be known as the first period; from August thirty-first to December thirtieth, inclusive, shall be known as the second period; from December thirty-first to April thirtieth, inclusive, shall be known as the third period. Licenses may be issued for the full license year or for the unexpired portion thereof, or for any period of the unexpired portion thereof; and the fee payable therefor shall be five hundred dollars in advance for the full license year, or \$166.67 in advance for each period: Provided, that if any license shall issue for the unexpired portion of the license year or for the unexpired portion of any period, the fee to be paid therefor shall bear the same ratio to the sum required for the whole year that the number of days in said

unexpired portion bears to the whole number of days in the year; and provided, further, that no license shall extend beyond the thirtieth day of April next following its issuance.”

The license issued to this applicant, according to the terms of this section of the ordinance, expired on December 31, 1903. Had he at that date made application for a license for the next succeeding period, I am of the opinion that under Section 2085 above referred to, it could be considered a renewal of the license theretofore issued to himself and in the absence of a protest against the renewal of the license from one-quarter of the property owners or bona fide householders, persons or firms doing business on both sides of the street in the block in which the said dram shop had its main entrance, filed thirty days prior to the time of the renewal of such license, he could have obtained a license for the next ensuing period under his old petition. From your communication it is apparent that he did not do this, but closed his place of business until March 2, 1904, when he made his new application. Although the license year extends from May 1 until the following April 30, the periods thereof are divided from May 1 to August 30; August 31 to December 30; December 31 to April 30, inclusive, and the license issued for each one of these periods expires on its face at the end of the period named therein.

Under the provisions of Section 2085, it appears to be the intent of the framers of the ordinance to exempt the applicant desiring to continue business at his old location from the necessity of filing an application, with its attendant petition, when he desires to obtain a renewal of the license. The fact that the applicant here was not doing business for a period of two months and two days, will not, in my opinion, require him to obtain the petition provided for by this section of the ordinance, provided, of course, no remonstrance has been filed against him.

Consequently, under this interpretation of the ordinance,

I am of the opinion that he can re-open his place of business under his old petition.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 18, 1904.

MR. EDWARD M. LAHIFF, City Collector.

Dear Sir:

I have a communication from you under date of March 12th, requesting the opinion of this department whether under the ordinances of the old Town of Cicero an applicant for a saloon license in that district whose proposed place of business is less than one-half mile from the old city limits can confine himself for signatures to his petition entirely within the annexed portion of the old Town of Cicero, or whether he can come into the old city limits for such signatures. In other words, is the applicant restricted to the old town limits of Cicero if his proposed location is within one-half mile from such limits, or can he obtain signatures from a district bounded by the circumference of a circle the radius of which is a line half a mile in length and the center of which is the proposed location, even though the circumference of this circle cuts into and includes in its arc a portion of the old city limits of Chicago?

The first point to be regarded in this matter is, I think, the manifest intention of the authorities of the Town of Cicero to secure for the inhabitants of the municipality freedom from invasion by dram shops except under certain conditions. Section 2, Chapter 5, Revised Ordinances of the Town of Cicero concerning dram shops, provides:

“No application for a license to sell or give away fermented, malt, vinous or intoxicating liquors shall be granted unless the same shall be accompanied with a petition praying that a license to sell liquors be issued to the applicant, and stating the exact locality where applicant proposes to sell

liquor and signed by a majority of the legal voters residing within one-half mile of the proposed place where liquors are to be sold."

The municipal authorities of the Town of Cicero must have known that the population outside of the town limits, especially on the borders of the neighboring municipality of the City of Chicago, would in time become dense and were the applicant for dram shop license to establish himself just inside the Cicero limits and have the privilege of obtaining consents within a radius of one-half a mile, going into the City of Chicago for a portion of these consents, that the effect of this ordinance as a measure of local protection would be seriously weakened. I think it may be presumed that the ordinances of any municipality are passed with reference to the well-being and protection of its own inhabitants, and exclude as far as possible any participation in the local government of the municipality by an adjoining one. To permit the people of Chicago to have any voice in the establishment of dram shops in the Town of Cicero proper, I think would be foreign to the intention of the framers of this ordinance. Were this not so, it would be possible for the portion of the population residing near the boundaries of the Town of Cicero in certain instances to dictate as to the licensing of saloons within the Town of Cicero itself, and this plainly never could have been the intention of the municipal authorities of Cicero.

Where the location of the saloon does not permit the drawing of a complete circle having as a center the proposed site of the saloon and as a radius a half mile line from that center, I am of the opinion that the consents are to be obtained only within that portion of the circle which is contained in and bounded by the town boundaries, and that persons living without the town boundaries, although included within the arc of the circle, have no voice in the establishment or location of any dram shop within the limits of the old Town of Cicero, and consequently, the signatures of such persons must

be excluded from the petition, and only those can be obtained in the district which I have indicated above.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 18, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have your favor of March 8, 1904, wherein you request this department to render an opinion as to whether or not it is the city's duty to thaw out frozen water service pipes, your inquiry having been prompted by the complaint of W. C. Toles.

Replying thereto, I beg leave to say that Section 3 of Article 10 of the "General Act for the Incorporation of Cities and Villages" (Chapter 24, Starr & Curtis, p. 786), provides that:

"The City Council or Board of Trustees shall have power to make all needful rules and regulations concerning the use of water supplied by the water works of said city or village, and to do all acts and make such rules and regulations for the construction, completion, management or control of the water works . . . as the said City Council or Board of Trustees may deem necessary or expedient. . . ."

In the exercise of the power conferred by the above section, the City Council has made the following regulations:

"All persons using water shall keep their own service pipes, stop cocks and apparatus in good repair and protected from frost at their own expense, and shall prevent all unnecessary waste of water through hydrants or defective pipes: Provided, however, that a reasonable time, not to exceed twenty-four hours, shall be allowed to parties having defective pipes to repair, to cause the same to be repaired." (Section 1973, Revised Code of Chicago, 1897.)

That the City Council had power to adopt the above regu-

lations under "Article 10 of the Cities and Villages Act", there can be no question. (Dillon on Municipal Corporations, Section 320.) The exercise of the power is of course subject to the limitation that the regulation must be a reasonable one. In my judgment the regulation is entirely reasonable.

It has been held that even in a case where the mains were negligently laid by the city too near the surface and were frozen up whereby the owner of an apartment house was unable to secure water and lost his tenants, he was not entitled to recover against the city except for the amount of water rates paid during the time that the supply was cut off. (*Smith v. Philadelphia*, 81 Pa. St. 38.)

In the present case I find no evidence of negligence on the part of the city whatever. The owners of the property having been notified to lower the service pipes at the time of the change in the grade of the street, and they having failed to do so, the freezing up of the service pipes is manifestly the result of their own negligence.

I am therefore of the opinion that the city is in no way liable for the damage occasioned by the freezing of these service pipes and is under no obligation to thaw them out.

Yours truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

MARCH 18, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering the inquiries contained in the letter of the Comptroller, dated March 7th, addressed to you, in regard to the application of the Civil Service law to the office of Deputy Comptroller, I beg leave to say:

The facts upon which this opinion is based are as follows:

The original Civil Service Act was passed March 20, 1895, and became a law July 1, 1895. The office of Deputy Comp-

troller was created by ordinance February 28, 1898 (since the passage of the Civil Service Act), and the office of Auditor was created at a still later date. The ordinance creating each of these offices provides that the appointment shall be subject to the approval of the City Council.

Mr. L. E. Gosselin was certified by the Civil Service Commission as an accountant, and then was assigned to perform the duties of the Auditor's office, said duties being those of an accountant. His nomination was approved by vote of the City Council. The Comptroller, in order to secure a higher efficiency and promote economy in the administration of the affairs of his office, has directed the Auditor to perform also the duties of the Deputy Comptroller. On July 20th Mr. Gosselin was appointed Deputy Comptroller and his appointment was confirmed by vote of the City Council. Mr. Gosselin claims the right to draw the salary provided by law for the office of Deputy Comptroller, but the Civil Service Commission declines to pass pay rolls for that purpose.

The question of law presented is, whether or not, under the circumstances above stated, the office of Deputy Comptroller is one which is exempt from the operation of the Civil Service Act under the provisions of those parts of Section 11 thereof which exempt (a) "heads of departments"; (b) "officers . . . whose appointment is subject to confirmation by the City Council."

The ordinance does not make the Deputy Comptroller head of a department, and if it did, the ordinance would be invalid in that respect, under the authority of the decision of the Supreme Court of Illinois in *People v. Kipley*, 171 Ill. 44 (76-82). Said decision is conclusive upon that point.

It is also held in said opinion that the words "'whose appointment is subject to confirmation by the City Council,' as used in Section 11 of the Civil Service Act, refer to officers whose appointment was subject to such confirmation at the time the Civil Service Act went into force. The words used are 'is subject,' not 'may be subject' by some future action of the council. . . . The words in Section 11 refer to cases where the council had already acted under said Section 2 of Article 6"

I am of the opinion that what the Supreme Court has said in the case above referred to, on the subject of officers whose appointment is subject to confirmation by the City Council, was largely influenced by the peculiar facts of the case. The ordinance there before the court was plainly an attempt to evade the provisions of the Civil Service Act by declaring certain subordinates to be heads of departments and providing that their appointment should be subject to approval by the City Council. The vice of the ordinance in declaring subordinates to be heads of departments vitiated the whole ordinance, and in my judgment brought the Supreme Court to a conclusion with regard to the other clause, "officers whose appointment is subject to confirmation by the City Council," which is extreme, and might not have been arrived at if the single question had been presented upon a record where, like this, the utmost good faith is shown.

I do not, however, feel at liberty, in view of the utterance of the Supreme Court, to disregard the plain language of their opinion, and am constrained to hold that until the Supreme Court shall modify their opinion, the law is, that only those officers whose appointment is subject to confirmation by the City Council whose offices were created by ordinance prior to the passage of the Civil Service Act are exempt under the provisions of Section 11. It may be that if this sole question were tested, a different conclusion might be reached by the court, but until such different conclusion is obtained, the only safe rule is to abide by the existing decision.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

MARCH 18, 1904.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

In your favor of the 1st inst., addressed to the Corporation Counsel, you instructed the institution of suit against the sureties of William A. Suddith, police court clerk, upon his official bond, Document No. 710, to recover the amount of his shortage.

The condition of this bond recites that Suddith was appointed May 8, 1899, clerk of the 7th District Court, to hold said office for the period of two years "and until his successor shall be duly elected and qualified."

I understand that Suddith was reappointed to his position in the years 1901 and 1903 and that the defalcation of Suddith occurred early in 1903 subsequent to his last reappointment.

Upon this state of facts, I am of opinion that the bond referred to expired at the expiration of Suddith's first term of office or upon his reappointment and subsequent qualification, and, therefore, the sureties therein are not liable for any shortage that occurred after the first reappointment of their principal. The law seems well settled that an official bond covers only the official acts of the term of the office for which it was given; even though the law fixing the term of the office in question declares that the officer shall hold for a given term and until his successor is elected. The sureties, if liable at all after the expiration of the prescribed term, are only liable for such defalcations as occur within a reasonable time after the expiration of the period within which such successor might have been appointed or chosen, although he may not, in fact, have been appointed or chosen. (*Trustees of Schools v. Arnold*, 58 Ill. App. 106; *McLean et al. v. People*, 85 Ill. 205; *Stern et al. v. People*, 96 Ill. 475; *State v. Powell*, 40 La. Ann. 241; *Hubert v. Mendheim*, 64 Cal. 213; *People v. Aikenhead*, 5 Cal. 106; *Kingston Mut. I. Co. v. Clark*, 33 Barb. 196, and *Yoakley v. King*, 78 Tenn. 67.)

In the present case there was, as has been said, an actual reappointment and qualification of Suddith as clerk. The fact that the officer who succeeded Suddith in his office in the years 1901 and 1903 was Suddith himself, satisfied the condition of the bond for the appointment and qualification of a "successor" as fully as if another person had succeeded him. (*Citizens' Loan Assn. v. Nugent*, 40 N. J. L. 215; *Trustees of Schools v. Arnold*, 58 Ill. App. 103, 106, and *Mayor, etc., of Rahway v. Cromwell*, 40 N. J. L. 207.)

It should also be observed that when there is nothing to show during which of several successive terms the defalcation

of an officer occurred, it should be referred to the last term in an action against sureties on the official bond. (*Pape v. People*, 19 Ill., App. 24; *Heppie v. Johnson*, 73 Cal. 265.)

I return herewith the bond in question.

Very respectfully yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 21, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

You have requested this department, under date of March 16th, to advise you as to whether or not the City of Chicago can compel the Chicago & Western Indiana Railroad Company to rearrange its tracks crossing 18th street so that the Sanitary District can proceed with the construction of abutments for a new double roadway bascule bridge over the Chicago River at said point.

Replying to your inquiry I beg leave to say that the tracks of the said railroad company were laid and are being maintained under authority granted by ordinance passed September 15, 1879 (Special Ordinances of Chicago, 1898, p. 587).

It is well settled that the streets of the city belong to the city for the use of the public and that the rights of the public are paramount. Whatever rights the Chicago & Western Indiana Railroad Company has to occupy 18th street with its tracks are subject to the rights of the public to use said street for the purposes of a public street or highway. If the City of Chicago itself were about to undertake the work mentioned in your letter I have no doubt that it could compel the railroad company above named to remove such tracks or such of them as interfered with the work contemplated. (See authorities collected in Vol. 36, Am. Digest, Sec. 733.) The fact that the Sanitary District is to do the work, in my opinion, does not affect the question at all.

I think that the city has power to compel the Chicago &

Western Indiana Railroad Company to rearrange or remove its tracks so as to permit the execution of the work above mentioned. I have prepared and hand you herewith a form of notice which may be served on the said company for this purpose.

Correspondence and blue prints returned herewith.

Very truly yours,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

^d MARCH 23, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have before me a letter addressed to the President of the Civil Service Commission, concerning the action of the Commission in permitting non-residents to take the examination for the position of Chief Sanitary Inspector, on which action you request this department to render an opinion.

In the "General Act for the Incorporation of Cities and Villages," enacted April 10, 1872, Chapter 24, Starr & Curtis' Annotated Statutes, is found the following:

Paragraph 78. "No person shall be eligible to any office who is not a qualified elector of the city or village and who shall not have resided therein at least one year next preceding his election or appointment, nor shall any person be eligible to any office who is a defaulter to the corporation."

An act of the legislature adopted and in force July 1, 1895, purports to amend "Section 77" of the Cities and Villages Act of 1872. The Cities and Villages Act, however, contains no section numbered "77" in any of its articles, and the act of July 1, 1895, was clearly intended to amend Paragraph 78 above quoted. It is a re-enactment of said Paragraph 78, with two qualifications added, the new matter beginning with the word "provided." The act appears as Paragraph "77a" in Starr & Curtis' Annotated Statutes on page 723, and is as follows:

Paragraph 77a. "No person shall be eligible to any office who is not a qualified elector of the city or village and who shall not have resided therein at least one year next preceding his election or appointment, nor shall any person be eligible to any office who is a defaulter to the corporation: Provided, however, this shall not apply to the appointment or election of city engineers in incorporated cities and villages; and provided that the same shall not apply to appointment of attorneys in incorporated villages if such appointee be not a defaulter to the corporation."

The provisions of the Civil Service Act upon the subject of residence of candidates, are as follows:

"Sec. 4. Rules. Said Commission shall make rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions, and the Commission may, from time to time make changes in the original rules."

"Sec. 6. Examinations. All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. . . ."

It will thus be seen that the Civil Service law itself provides that the examinations shall be open to "all citizens of the United States" with "specified" limitations as to residence, age, etc. The question then arises, by whom are these limitations to be specified. If the limitations related solely to "residence" or even to "residence" and "age", it might be contended with some force that the language used indicates such as had theretofore been or might thereafter be established by the legislature. But as limitations as to "health", "habits" and "moral character" are also referred to, and as the legislature never has established any such, I am forced to the conclusion that the "specified limitations" above mentioned are such as may from time to time be established by the Civil Service Commission in the exercise of its powers to make rules, under Section 4 of the Civil Service Act above quoted.

Referring to the rules adopted by the Civil Service Commission, we find the following:

RULE III

“Section 1. Citizenship and Residence. No person shall be admitted to examination for any position in the Classified Service who is not a citizen of the United States, and who has not been an actual resident of the City of Chicago for at least one year next preceding the date of examination.”

“Section 3. Waiver of local residence in special examinations. In special examinations for any place requiring technical, professional, or scientific knowledge, or manual skill of a high order, the Commission may waive the requirement of residence in the City of Chicago, fixed in Section 1 of this rule.”

The Civil Service Commission thus having expressly reserved the right to waive the requirement of residence in Chicago in certain cases, and having, as I am informed, waived such requirement in the case of the examination for the position of Chief Sanitary Inspector, it would appear that it was entirely proper to admit non-residents to said examination, unless Paragraph 77a, hereinbefore quoted, had the effect of amending the Civil Service law and the rules adopted thereunder, as contended for by the Master Plumbers' Association.

It appears that Paragraph 77a is no more than a re-enactment of Paragraph 78, which was in force at the time of the adoption of the Civil Service Act, in addition to which exceptions are made in the cases of city engineers and attorneys. Paragraph 77a does not purport to be an amendment to the Civil Service law, nor is there anything in the act, nor in the circumstances attending its adoption, from which it can be implied that it was the intention of the legislature thereby to amend the Civil Service law. One of the elementary principles of the statutory construction is that amendments by implication are not favored. It should be noted, moreover, that both this amendatory act (Paragraph 77a) and the Civil Service law were adopted at the same session of the legislature, and had it been the intention of the legislature to amend the Civil Service law it would undoubtedly have done

so in express terms. It might, perhaps, be urged that there is conflict between Paragraph 77a, *supra*, and the Civil Service Act, if the position here taken is sound, but the answer to that is that the Civil Service law itself provides that it shall not go into effect in any city until adopted by a vote of a majority of the electors of such city; until so adopted, a city would therefore, in so far as the appointment of officers and employes is concerned, be subject to the provisions of the Cities and Villages Act of 1872, of which Paragraph 77a is a part (assuming that such city were incorporated under the general act); upon the adoption of the Civil Service Act, however, such city would thereafter be governed by the provisions of said last mentioned act, and where any of such provisions conflict with provisions of the Cities and Villages Act, the provisions of the Civil Service law must govern.

For the reasons above indicated, I am of the opinion that the act of July 1, 1895 (Paragraph 77a, *supra*), was not intended to amend the Civil Service law, and should not be construed to give it that effect, that Sections 4 and 6 of the Civil Service law, and Sections 1 and 3 of Rule III, of the Civil Service Commission of Chicago, remain in full force and effect, and that it was competent for the Civil Service Commission to admit non-residents to the examination for the position of Chief Sanitary Inspector.

Yours respectfully,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel. "

MARCH 24, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Replying to your letter of February 24th, asking what action you may take to compel the Chicago General Railway Company to comply with a council order of February 17, 1904, requiring the company to pave and repair the center sixteen feet of 25th street, between Rockwell street and Lawndale

avenue, I beg leave to advise you that, by an ordinance passed April 5, 1893, the grantor of this company was given the right to operate a street railway on the above street, subject to the additional provisions of an ordinance passed February 8, 1892.

Section 4 of the last mentioned ordinance requires the company to keep the street in good condition and repair, to-wit: eight feet in width where a single track shall be laid, and sixteen feet in width where a double track shall be laid, and if the company shall refuse or fail so to do, the same may be done by the city, and the company shall be liable to the city for the cost thereof.

Each of these ordinances requires a bond to be furnished, and Section 11 of the ordinance of February 8, 1892, provides as follows:

“The said company shall execute to the City of Chicago a good and sufficient bond in the penal sum of twenty-five thousand (\$25,000) dollars, to be delivered to and approved by the Mayor, conditioned for the faithful observance and performance of the provisions and conditions of this ordinance, on its part to be observed and performed as aforesaid.”

Section 4 of the ordinance of April 5, 1893, provides as follows:

“This ordinance must be accepted by said company within ninety (90) days after its passage and approval by the Mayor, and the same shall take effect and be in force from and after its passage. An additional bond of ten thousand dollars (\$10,000), with said company as principal, shall also be filed with the city clerk, conditioned to the performance of the conditions herein named.”

Under these ordinances the city may pave and repair the street and charge the cost thereof to the company, and in default of payment it may sue on the bonds and take the chance of collecting the amount from the sureties; or you may notify the sureties that the company is not complying with the terms of the bonds, and that the city will sue the sureties if the council order is not complied with. If this does not bring the desired results, the city may file a bill to annul the contract created by these ordinances.

If you follow one or more of the methods suggested, I am of the opinion that you will be successful.

As you probably know, the company is in the hands of a receiver appointed by the Circuit Court of Cook County, and the city could file an intervening petition in this suit and ask that the receiver be required to comply with the council order, but the receiver would no doubt successfully plead a want of sufficient funds at this time for such a purpose.

Very truly yours,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 26, 1904.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

Replying to your inquiry of 22d inst. in regard to the construction to be put upon certain sections of the tenement house ordinance, I beg leave to advise you that from the rough draft attached, it appears that the entire lot was 50 by 125 feet; that it is situate at the junction of two streets and abuts on a public alley; that as it stands now, the rear of the lot abuts on the alley; that the proposed building is to be erected at and across the rear of this lot at the junction of the side street and the alley and is to be built up to the lot line on the front; that there is a space of six feet between the rear of the building and the lot line, except where the porches are to be constructed at each end of the building, in which case there is no space whatever between the building and lot line.

As I understand it, the builder claims that what is at present the rear of the lot will continue to be so after the erection of the proposed building, and the issue between you turns on that point.

Section 18 of the ordinance provides in part as follows:

"Sec. 18. At the rear of every lot containing a new tenement house (unless the rear of said lot abuts upon a public alley at least ten (10) feet wide), there shall be a yard open

and unobstructed from the earth to the sky . . . Such yard shall, on corner lots (as above defined), have an area of at least eight (8) per centum of the superficial area of the lot and shall on other lots have an area of at least ten (10) per centum of the superficial area of the lot."

" . . . in no case shall such yard separate any building on such lot by less than ten (10) feet from the rear line of the lot at the nearest point of approach of such building to such rear line."

Sub-section 3 of Section 1 defines a yard as "an open unoccupied space on the same lot with a tenement house, separating every part of every building on the lot from the rear line of the lot."

It does not follow that what is the rear of a lot to-day will always remain so, because the owner of such a lot may so divide it in constructing buildings thereon as to shift the rear of the lot to what was once the side. In such a case as this I am of the opinion that the rear of the building and the rear of the lot are coincident.

In my opinion the plan of this proposed building conflicts with Section 18 in two particulars: It being a corner lot, it has not the required area, and the rear of the building is within less than ten feet from the rear line of the lot.

Very truly yours,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Acting Corporation Counsel.

MARCH 30, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In a communication of recent date addressed to the Corporation Counsel, you suggest the drafting of an ordinance requiring detective agencies to take out licenses from the city.

Article VI., Section 1 of the Cities and Villages Act (Hurd's Rev. Statutes 1901, Chap. 24), provides that the City Council shall have the following power:

“66. To regulate the police of the city or village and pass and enforce all necessary police ordinances.”

“68. To prescribe the duties and powers of a superintendent of police, policemen and watchmen.”

No express power is granted to the City of Chicago by the above provisions to exact license fees from detective agencies for purposes of revenue. There is no inherent power in a municipal corporation to impose licenses and business taxes upon persons or corporations, and the power will never be held to exist in the absence of an express grant or by necessary implication. Statutes delegating such power should be construed strictly, and a doubt as to the existence of the power must be resolved against the city. (*Kiel v. City of Chicago*, 176 Ill. 137; *Wilkie v. City of Chicago*, 188 Ill. 444; *Holder v. Galena*, 19 Ill. App. 409; *State v. Smith*, 67 Conn. 541).

It is also the law of this State that a license for the regulation of occupations and not for revenue can only be justified upon the ground that a necessity exists for the exercise by the State, either directly or through delegation to municipal corporations, of this police power. (*Bessette v. The People*, *supra*, 193 Ill. 334).

The law is equally well settled that where the public welfare demands legislation prescribing regulations and restrictions to prevent imposition and extortion or similar evils which have manifested themselves in the conduct of a private business, such legislation may require the procuring of a license to carry on such business and the payment of a fee and the execution of a bond as a prerequisite to the issuance of a license. (*Price v. The People*, 193 Ill. 114; *Gundling v. City of Chicago*, 176 Ill. 340).

The amount determined upon by the legislative body to be paid for a license imposed for regulation is conclusive, unless it is manifest that the real purpose of the license is to raise revenue under the guise of police regulation or to prohibit a lawful business by oppressive license fees. (*Price v. The People*, *supra*.)

In the *Price case*, the Supreme Court held that the requirement of an annual license fee of \$200 and a bond of \$1,000 for a private employment agency was a valid exercise

of the power of regulation, and in the *Gundling case* an annual license fee for the sale of cigarettes was sustained as reasonable, the amount being \$100.

Applying the foregoing general principles to the present subject, I am of the opinion that the regulation of private detectives, policemen and watchmen is fairly relevant to the police regulations of a great city (*State v. Bennett*, 102 Mo. 356, 364); and while I find no direct authority upon the question, I think that, in view of the many abuses that have grown out of the exercise of their calling by private detectives, such as blackmail, extortion and like evils, an ordinance, requiring all private detectives to obtain licenses before continuing in or engaging in their business, and that they shall pay a license fee therefor, and that the applicant shall be a man of good character, is a valid exercise of its police power of regulation by the City of Chicago.

In this connection it should be said that an ordinance imposing a license fee ought to show with sufficient clearness whether such a fee is exacted for purposes of revenue or of regulation merely, although the presumption is that regulation is the object (*Bassette v. The People*, *supra*; *Banta v. City of Chicago*, 172 Ill. 204).

As has been intimated above, an ordinance imposing a license fee upon detective agencies for purposes of revenue would be invalid.

I transmit herewith a draft of an ordinance carrying out the views expressed by this opinion.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Acting Corporation Counsel.

APRIL 2, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have your communication of recent date, asking an opinion from this department as to the power of the city to

compel various railroad companies, whose rights of way are spanned by viaducts, to keep the viaducts over their tracks free from snow.

The duty is imposed upon railroad companies by statute, where the lines of road of such companies cross highways and streets in the State "to construct and maintain said crossings and approaches thereto within their respective rights of way, so that at all times they shall be safe as to persons and property."

Where the growth of cities has required, as a measure of precaution for the safety of the inhabitants and those using the streets crossed by railroad tracks, that viaducts should be erected over the tracks crossing any street, this exercise of power has been upheld by our courts, and is sanctioned by Section 1742 of the Municipal Code of 1897; and viaducts have been generally constructed throughout the city over crossings where the increase of traffic necessitated the viaduct as a proper method of rendering the crossing safe at all times as to persons and property.

And in the further exercise of the general power, the railroad companies have been compelled to maintain, keep in repair, and pave, not only the viaducts, but the approaches thereto.

The various ordinances and agreements with reference to the construction of viaducts by the railroad companies contain provisions rendering it the duty of the companies to maintain and keep in repair the structures so built. I think, however, that the power of the city in this respect is at an end when the railroad company has erected, and maintains and keeps in repair this means of rendering the crossing safe.

I apprehend that it would not be the duty of the railroad company, either under the statute, or under any general ordinance of the city, to remove the snow from its crossing with a street, were such crossing at grade. The duty of keeping the streets open for traffic and travel by the public is one which devolves upon the municipality, and cannot be transferred upon the railroad company, either where the crossing is at grade, or where, for the purpose of rendering the crossing safe, the company has been compelled to span its tracks

with a viaduct, the viaduct being in such case merely a portion of the street.

Were the act of the railroad company, in erecting the viaduct, to bring about a condition different from the pre-existing one, and one which would require the assumption of an additional burden by the company to restore the street to its original condition, the additional burden, I think, might be legally placed upon the railroad company. An instance familiar to all, and illustrative of the principle I have stated above, is the requirement upon the railroad companies to illuminate subways at crossings necessitated by track elevation. In that case, public safety demanded the elevation of railroad tracks, and in compliance with that demand, subways became necessary as a part of the scheme of track elevation, and the street crossing thus being darkened by the change in the method of crossing, it became the duty of the railroad company to restore the crossing to its original well lighted condition.

In the present case, were the accumulation of snow upon the viaduct referable in any way to the action of the railroad company in erecting or maintaining the viaduct, they could be compelled to remove the snow, but such is not the case. The accumulation of snow upon the viaduct is the same as it was upon the street before the viaduct was erected, and as the company could not then, in my opinion, be compelled to remove the snow at the crossing by the city, so it cannot now insist that the company remove the snow from the viaduct.

In the case of the *City v. Union Traction Company*, 199 Ill. 259, it was held that a street railway company, occupying and using a portion of the public streets, could be compelled, under the exercise of the police power, to remove the dirt lodging upon its sixteen foot strip, because in that case the method of pavement (flat crown), the holding of dirt by the rails, and the distribution of dust through the rapid motion of the cars, created an unusual condition, and one which had been brought about by the use and occupancy of the street by the railway company.

The duty to clean the streets is also based upon the special privilege which the railroad company enjoys in the streets, and the court says in this regard:

“The privilege enjoyed by the defendant in error company to maintain its railway in the street and operate its cars thereon, is to be exercised in the interest of the public. . . . It was to serve the public that the privilege was granted to it. Its business and property are impressed or affected with public use. It may, therefore, be subjected to municipal regulations of a greater scope, in the interest of the public at large, than that of a railroad company exercising its franchise on its own road bed.”

The railroad companies in the present instance are receiving no special benefits from the municipality, and are, consequently, not impressed with the special duties required of companies using the streets. Here the statute gives them the right to cross streets in the city without the consent of the municipality, and requires, in the exercise of that right, that they shall at all times keep such crossings safe as to persons and property.

In the performance of this duty, it has become necessary in many instances to erect, maintain and keep in repair viaducts. When they have performed this duty imposed by statute, I think they have done all which the city can exact, and I am of the opinion that the removal of snow from the viaduct is not a duty which the city can impose upon these companies.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

APRIL 2, 1904.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

We hereby acknowledge receipt of your favor of February 2d, in which you enclose a letter from the Comptroller in reference to special assessments against park property under the control of the West Park Commissioners, and request an opinion as to “whether or not park property is, under the law,

exempt from special assessments''; and further direct that the attorney for the Board of Local Improvements take such steps ''either by mandamus or any other proceedings, which, in (his) your judgment would result in the collection of the assessments referred to by the Comptroller.''

In reply we beg to say that the question which you submit has been passed upon by the Supreme Court of Illinois in the case of *West Chicago Park Commissioners v. Chicago*, 152 Ill. 392, and it was there held that park property under the control of the West Chicago Park Commissioners was not subject to special assessments levied by the City of Chicago. In its opinion the Court said (p. 395) :

''That the case was brought as a test case for the purpose of settling the question of the power of the City of Chicago to assess the lands of the parks and boulevards under the control of the appellants (West Chicago Park Commissioners) for the improvement of streets adjacent thereto or abutting thereon.''

The court held that the park board in the purview of its powers is a corporation endowed with the same corporate functions, derived from the same source and exercised in substantially the same way as the City of Chicago; that its power, so far as relates to the laying out, improvement, management and control of the parks, is plenary, and independent of the City of Chicago; and that the jurisdiction to levy special assessments on such park property is in the Park Commissioners, and not in the City of Chicago.

The court, however, did not hold that park property is exempt from assessment by the proper municipal authority, but only that the City of Chicago did not have the authority to make such assessment.

It follows from this decision, therefore, that the answer to your inquiry is that all park property under the control of a Board of Park Commissioners vested with powers by the legislature similar to those of the West Park Commissioners, could not be assessed for local improvements by the City of Chicago.

And it necessarily follows that the City of Chicago has no power to proceed against the West Park Commissioners,

either by mandamus or any other action, to collect a special assessment levied against such park property.

Respectfully submitted,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

FRANK JOHNSTON JR.,

Assistant Attorney Board of Local Improvements.

Approved:

WILLIAM H. SEXTON,

Acting Corporation Counsel.

APRIL 5, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Replying to your inquiry of the 28th ult., with stated enclosures, for information as to how you shall proceed to advertise and sell the sewage pumping engines at the pumping station at 73d street and Railroad avenue, I beg leave to advise you that by an act in force July 1, 1889, the city is authorized to sell any personal property whenever the same shall not be longer necessary for use by the city. (Section 274, Chapter 24, 1st Starr & Curtis, p. 815.) The sale must be ordered by the City Council by ordinance passed by three-fourths of the members thereof. The ordinance must specify the location of the property and the use thereof, and such ordinance and the proposal must be published in a daily or weekly paper for a period of not less than sixty (60) days. The notice must contain an accurate description of the property, the purpose for which it is used and at what meeting the bids will be considered and opened, and you shall advertise for sixty (60) days for bids therefor. The bids must be opened only at a regular meeting of the council and be accepted only upon the vote of three-fourths of the members thereof. The council may, however, by a majority vote reject any and all bids.

You say in your letter:

“Mr. Hill, of the Board of Local Improvements, informs me that this station was built under special assessment some years ago but that there was a deficiency in said special assessment fund, in consequence of which the contractor did not

receive the full amount of his contract from the city but still holds city vouchers for the deficit, and it is the desire of the special assessment department that these engines be sold to the highest bidder and the amount thereof received to be placed to the credit of said special assessment deficit to reimburse the contractor so far as said amount will extend."

If this statement is correct and the fact is that the station was built by special assessment and there was a deficit, then it would be legal to credit the proceeds of this sale to the fund; but if, on the other hand, the expense of the same was defrayed by funds derived from general taxation, then it would be illegal to credit the same to the special assessment fund. This is a question of fact which must be determined by you.

I enclose herewith form of ordinance which I believe is sufficient for the purpose.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

APRIL 6, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In your favor of recent date you requested an opinion from the Corporation Council as to the power of the City Council to exact license fees from medical institutions or dispensaries engaged in peddling remedies upon the streets.

Section 1 of Article 5 of the Cities and Villages Act provides that the City Council shall have the power:

"41. To license, tax, regulate, suppress and prohibit hawkers, peddlers . . . and to revoke such license at pleasure."

"66. To regulate the police of the city or village and pass and enforce all necessary ordinances."

"77. To erect and establish hospitals and medical dispensaries and control and regulate the same.

"78. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

It is also provided by Section 1 of the act to extend the powers of the City Council in cities, etc. (Hurd's Rev. Statutes, 1901, p. 289):

"That the City Council in cities . . . shall have power to license, tax, regulate, suppress or prohibit itinerant merchants and transient venders of merchandise."

I am of the opinion that under the powers quoted, the city possesses the right by an ordinance, general in its application, to require venders of remedies and patent medicines to take out a license to pursue their business and pay license fees therefor.

Under the forty-first and seventy-seventh clauses of Section 1 of Article 5 of the Cities and Villages Act quoted above, the city is given the power, in my opinion, to impose license fees, not merely for purposes of regulation, but they may be large enough to produce revenue.

I transmit herewith an ordinance calling for licenses and license fees in accordance with the views herein expressed.

Very respectfully,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

APRIL 12, 1904.

MR. A. H. NELSON, Superintendent South Park Improvement Association.

Dear Sir:

Replying to your favor of recent date wherein you wish to be advised "as to the proviso in the charter of the Chicago City Railway Company, if such there is, requiring said company to sprinkle the streets along which their right of way runs," and as to whether said company is thereby required to sprinkle the entire street or only the right of way, I beg leave

to say that the charter of the Chicago City Railway Company contains no such provision.

There is, however, a provision in the Revised Code of Chicago of 1897, requiring all street railway companies to sprinkle the streets upon which their tracks are laid. Said provision reads as follows:

“1715. *Street sprinkling—penalty.* The several street railway companies having their railway tracks located in and along the different streets within the City of Chicago shall, from and after the first day of May and during and until the first day of November in each and every year, keep moistened and well sprinkled with water the several streets within the City of Chicago upon and along which they, or either of them may use or operate their respective railway tracks. And each and every of such street railway companies shall, for each and every day they or any of them shall fail to comply with the provisions of this section, be liable to a penalty of not less than twenty-five dollars nor exceeding one hundred dollars.”

Very truly yours,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

APRIL 14, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have a communication from you asking an opinion from this department as to the status of patrol drivers of the police department with reference to the Police Pension Fund, and their eligibility as pensioners of the same.

The question calls for the construction of Sections 3 and 4 of the act of May, 1903, for the formation and disbursement of the Police Pension Fund. The provisions of Section 3 apply to any person who “shall be duly appointed and sworn and have served for a period of twenty years or more upon the regularly constituted police force of said city.” Section

4 provides "whenever any person, while serving as a policeman in any such city, village or town, shall become physically disabled while in and in consequence of the performance of his duty" as a policeman, he may receive a pension if the board see fit.

Patrol drivers constituting a separate branch of the service have been known since about 1887, patrolmen assigned to that special duty having performed this work theretofore. Patrol drivers at present take an oath similar to that of the ordinary policeman, excepting that they are sworn to perform their duty and obey the constitution of the State as "patrol drivers" instead of "police patrolmen." In the Civil Service classified lists they occupy a position different from that of patrolmen, the examination for them does not contain the rigid physical tests to which patrolmen are subjected and their selection is not governed by the age, weight and height limits which apply to the latter class. Patrolmen are not assigned to duty as patrol drivers, nor are patrol drivers drawn from the eligible register of patrolmen. The uniform of the drivers is somewhat different from that of the regular patrolmen, and while the former are permitted to wear stars, it is done, I am informed, for the purpose of permitting them to ride free on street cars, and the duties of drivers can only be exacted from them by their superiors. They appear, in my judgment, to be a class quite distinct from the ordinary police officer, as much so perhaps as are the telegraph operators and clerical force of the police department. Patrol drivers in the performance of their duties are not subjected to the risks of physical violence and the general dangers of the police patrol service, and finally, no contribution to the police pension fund is exacted or permitted from the drivers.

I am consequently of the opinion that the patrol driver is not entitled to participate in the benefits of the Police Pension Fund.

Replying to your inquiry as to whether the status of the drivers could be changed by ordinance, I am of the opinion that the only method by which the status of the drivers can

be changed is by a change in the legislative act, and not by any municipal ordinance.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Acting Corporation Counsel.

APRIL 14, 1904.

MR. E. M. LAHIFF, City Collector.

Dear Sir:

I have your letter of the 8th inst., requesting an opinion as to what frontage consents are necessary in an application for a saloon license in a block bounded by three streets and an alley, the property lying beyond the alley being unsubdivided. The block is bounded by 96th street on the north, Avenue "N" on the east, 97th street on the south, and an alley on the west. West of the alley lies unsubdivided property occupied by the Iroquois Furnace Company, which property runs from said alley to the Calumet River.

The location of the proposed saloon is in that part of the City of Chicago which was formerly the Village of Hyde Park, but outside of the prohibition district thereof. Section 1 of an ordinance of the Village of Hyde Park and now in force in that territory, is as follows:

"Any person who shall desire to obtain a license to keep a saloon or dram shop, shall, in addition to the requirements now provided by ordinance, present his application, in writing, to the Village Comptroller for such license, in which shall be stated the name of the person or firm to whom the license is to be issued, and the place where such license or dram shop is to be kept, which application shall be signed by a majority of the property owners, according to the frontage, on both sides of the street, in the block upon which such dram shop is to be kept, and shall also be signed by a majority of the *bona fide* householders and persons or firms living or doing business on each side of the street, in the block upon which such dram shop shall have its main entrance."

Said section requires that the application for the saloon license shall be signed by two classes of persons; first, by a majority of the property owners, according to the frontage, on both sides of the street in the block upon which the dram shop is to be kept, and secondly, by a majority of the *bona fide* householders and persons or firms living or doing business on each side of the street in the block upon which the said dram shop shall have its main entrance.

The construction of the word "block", as used in the ordinance, was the subject matter of the opinion of the Supreme Court of Illinois in the case of *Harrison v. The People ex rel Boetter*, 195 Ill. 466, and the court there held, on the authority of the definition of the word "block" by the Century Dictionary and Webster, and on the authority of a number of cases of other jurisdictions, that its proper construction is, "a square or portion of a city enclosed by streets, whether occupied by buildings or not."

The proposition now under discussion, however, presents a peculiar aspect, in that the specific location of this saloon is not "a square or portion of a city enclosed by streets," but owing to the fact that it is bounded by three streets and an alley, but half a square.

The Supreme Court of Kansas, in the decision cited in the *Harrison case, supra*, entitled, "*Olson v. Topeka*, 42 Kas.," at page 712, said that although a square be cut into blocks by an alley running through it, yet these blocks are not, in fact, to be considered blocks, as that term is synonymous with "square." In construing ordinances, no less than statutes, all general provisions, terms, phrases and expressions should be liberally construed in order that their true intent and meaning may be fully carried out, and where great inconvenience or absurd consequences would result from a particular construction, that construction should be avoided, if possible. (*People v. Harrison*, 191 Ill. 257.)

In the case under consideration we have not a block as defined by the Supreme Court in the Boetter case, but a "half block"; if the ordinance requires the consent of a majority of the property owners according to frontage on both sides of the street in the block upon which the proposed

dram shop is to be kept, certainly a reasonable construction of the ordinance requires the consent of a majority of the property owners of a portion of a block in a case of this character. The greater includes the less. I am therefore of the opinion that the consents here necessary are: First, by a majority of all the property owners, according to frontage on the three streets and said alley; and secondly, by a majority of the *bona fide* householders and persons or firms living or doing business on each side of the street in the block upon which the proposed dram shop shall have its main entrance.

I return plat herewith.

Very truly yours,

WM. H. SEXTON,

Acting Corporation Counsel.

APRIL 14, 1904.

MR. L. E. STANHOPE, Deputy Commissioner of Buildings.

Dear Sir:

I have your letter of the 7th inst., stating that you and Mr. George A. Trude, representing certain theater owners, differ materially in the interpretation of the last paragraph of Section 33 of the new Class V ordinance as to whether in reducing the seating capacity of existing theaters to comply with said section, any number of seats less than 100 can be taken in determining the proper ratio between the seating capacity and the exits; viz; if the exit is too small for 400 seats, should not the seating capacity be reduced to 300 although the exit would be sufficient for 350.

You ask the opinion of this department as to the proper construction of said paragraph. Said paragraph reads as follows:

"In the case of existing theaters instead of increasing the width required for aisles, exits and stairways to the basis of 20 inches per 100 seats, the owner, lessee or manager shall have the privilege of reducing the number of permanent seats until the same ratio between said width and number of seats shall be established, and if such privilege be taken advantage of it shall be the duty of the Commissioner of Buildings to make inspection and certify that said ratio actually exists

before license for operation of said theater shall be issued.”
(See page 2064, Current Council Proceedings.)

The first paragraph of said section, pertaining to buildings hereafter constructed, reads:

“Stairs in buildings of Class V shall be in width equivalent to 20 inches for every 100 seats and fractional parts thereof in such buildings, but in no event shall any stairway in such building be less than four feet wide in the clear.”
(See page 2063, Current Council Proceedings.)

In my opinion, the proper construction of said paragraph is that in existing theaters, instead of increasing the width required for aisles, exits and stairways to the basis of 20 inches per 100 seats, the owner, lessee or manager shall have the privilege of reducing the number of permanent seats until the *same ratio* between said width and number of seats shall be established, and not that the width should be equivalent to 20 inches per every 100 seats “*and fractional parts thereof.*”

Answering the question you submit for illustration, my construction of said last paragraph of Section 33 is that if the exit is too small for 400 seats, the number of permanent seats need not be reduced to 300, if the exit would be sufficient for 350.

Very truly yours,

WM. H. SEXTON,
Acting Corporation Counsel.

APRIL 15, 1904.

MR. JOHN J. SLOAN, Superintendent, House of Correction.

Dear Sir:

Your favor of March 16, 1904, in which you request an opinion as to your right to compel prisoners whose board is paid by either the government, county or villages to work, has been referred to me for reply.

The provisions of the statutes relating to houses of correction are as follows: Hurd's Rev. Statutes, 1901, Section 1, Chapter 67:

“That it shall be lawful for the municipal authorities of any city within this State to establish a House of Correction, which shall be used for the confinement and punishment

of criminals, or persons sentenced or committed thereto under the provisions of this act, or any law of this State, or ordinance of any city or village, authorizing the confinement of convicted persons in any such House of Correction.”

“Sec. 3. That whenever a board of inspectors have been authorized as in Section second of this act directed, they shall have power and authority to establish and adopt *rules for the regulation and discipline* of the said House of Correction, . . . to make all such by-laws and ordinances in relation to the management and government thereof as they shall deem expedient. . . .

“Sec. 4. . . . There shall be a meeting of the entire board, at the House of Correction, once in every three months, when they shall . . . make such further rules and regulations for the good government of said House of Correction as to them shall seem proper and necessary. . . . All rules, regulations or other orders of said board, shall be recorded in a book to be kept for that purpose, which shall be deemed a public record. . . .

“Sec. 5. The books of said House of Correction shall be so kept as to clearly exhibit the state of the prisoners, . . . the number employed as servants or in cultivating or improving the premises, *the number employed in each branch of industry carried on.* . . .”

“Sec. 8. The Board of Supervisors or Commissioners of any county, and the Board of Trustees of any village or town, in any county in this State, in which a House of Correction is established, shall have full power and authority to enter into an agreement with the legislative authority of such city, or with any authorized agent or officer in behalf of such city, to receive and keep in said House of Correction any person or persons who may be sentenced or committed thereto by any court or magistrate. . . .

“Sec. 9. In counties, towns and villages having such agreement with any such city, it shall be the duty of every court, police justice, justice of the peace or other magistrate in such county, town or village, by whom any person, for any crime or misdemeanor punishable by imprisonment in the county jail, shall be convicted, to commit such person to the

said House of Correction in lieu of committing him to the county jail, village or town calaboose, *there to be received and kept in the manner prescribed by law and the discipline of said House of Correction.*

"Sec. 10. It shall be the duty of the sheriff, constable, or other officer . . . to . . . deliver such person to the keeper or other proper officer of said House of Correction, whose duty it shall be to receive such person so sentenced, *and to safely keep and employ such person for the term mentioned in the warrant of commitment, according to the laws of said House of Correction.* . . .

"Sec. 11. All provisions of law and ordinances authorizing the commitment and confinement of persons in jails, bridewells and other city prisons, are hereby made applicable to all persons who may or shall be, under the provisions of this act, sentenced to such House of Correction."

"Sec. 13. The expenses of maintaining any such House of Correction over and above all receipts for the *labor of persons confined therein,* . . . shall be audited and paid from time to time by the legislative authority of said city, . . ."

Ch. 24, Hurd's Rev. Statutes, 1901, Par. 299:

"Sec. 1. . . . any person upon whom any fine or penalty shall be imposed, may, upon the order of the court or magistrate . . . be committed to the . . . House of Correction . . . until such fine, penalty and costs shall be fully paid: . . . The City Council or Board of Trustees . . . shall have power to provide by ordinance that every person so committed shall be required *to work at such labor as his or her strength will permit* . . . not to exceed ten hours each working day; and for such work the person so employed, or worked, shall be allowed exclusive of his or her board, the sum of fifty cents for each day's work on account of such fine and costs." In force April 12, 1879.

Ch. 38, Hurd's Rev. Statutes, 1901, Par. 168a:

"That hereafter any person convicted in any court of record of any misdemeanor under the criminal code of this State, the punishment of which in whole or in part now is, or hereafter may be imprisonment in the county jail, the court

in which such conviction is had, may in its discretion, instead of committing to jail, *sentence such person to labor in the workhouse* of any city, town or county where the conviction is had, or”

Ch. 38, Hurd's Rev. Statutes, 1901, Par. 168b:

“That any person convicted of petit larceny, or any misdemeanor punishable under the laws of this State, in whole, or in part, by fine may be required by the order of the courts of record, in which the conviction is had, *to work out such fine and all costs, in the workhouse* of the city, town or county, or in the streets and alleys, of any city or town, or on the public roads in the county . . . at the rate of one dollar and fifty one hundredth dollars (\$1.50) per day for each day's work.”

Ch. 38, Hurd's Rev. Statutes, 1901, Par. 448:

“Sec. 10. Any person convicted in a court of this State having jurisdiction of any crime or misdemeanor, the punishment of which is confinement in the county jail, may be sentenced by the court in which such conviction is had, *to labor for the benefit of the county*, during the term of such imprisonment, in the workhouse, House of Correction or other place provided for that purpose by the county or city authorities.”

The ordinances of the City of Chicago relating to labor in the bridewell are the following sections of the Revised Code of Chicago of 1897:

“Sec. 1147. DUTIES—DAY'S LABOR, TEN HOURS. It shall be the duty of the Superintendent of the House of Correction to receive into the said House of Correction such persons as may be committed thereto by any court or magistrate in Cook County, authorized by the laws of the State or by any ordinance of the city, or any town or village in Cook County having a contract with the City of Chicago for the care of its prisoners, *and to put each of said persons so committed as are able to labor to the work which they are respectively best able to do*, not to exceed ten hours for each working day.

“Sec. 1148. DAILY CREDIT OF PRISONERS. Every person committed to the House of Correction shall be *allowed for each day's work*, exclusive of his or her board, the sum of

fifty cents, which shall be applied in payment and satisfaction of the fine and costs imposed upon such person."

"Sec. 1157. PRISONERS FROM OTHER COUNTIES. The board of inspectors of the House of Correction are hereby authorized to make contracts with any county in the State, or with the trustees of any town or village in Cook County, for the care and custody of prisoners for any term of years, not less than two, nor more than ten years, at a price not less than twenty-five cents per day for each such prisoner. All contracts shall extend for the care of such prisoner until the expiration of his term of sentence; and *the labor of every such prisoner shall be the property of and for the benefit of the City of Chicago.*"

The Federal statute relating to the confinement of criminals convicted of offenses against the United States in State jails and penitentiaries, is as follows: Section 5539. U. S. Compiled Statutes, 1901.

"Whenever any criminal convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the *same discipline* and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory."

It appears that the prisoners confined in the House of Correction are of four classes: First, prisoners convicted of violations of the ordinances of the City of Chicago; second, prisoners sentenced for violations of the laws of the State of Illinois; third, prisoners sentenced for violations of the ordinances of towns, villages and cities other than Chicago in Cook County; fourth, prisoners convicted of violations of the laws of the United States.

As to the first class, there is no doubt whatever that you have the authority, and that it is your duty to cause them to labor at such work as their strength will permit not to exceed ten hours per day. As to class two, it would seem that your duty is equally clear under Paragraph 448, Ch. 38 of Hurd's

Rev. Statutes of 1901—at least in all cases where persons are sentenced by the court to labor. I take it that all sentences imposed by the courts of Cook County to the bridewell include the provision of labor, and in all such cases you have undoubted authority to cause all such prisoners to labor in the manner hereinbefore described.

As to the fourth class, or prisoners sentenced for violations of the Federal laws, it is to be noted that Section 5539 of the Federal statutes in terms refers only to “jail or penitentiary of any State or Territory,” the literal construction of this section would exclude the House of Correction, since it is a city institution and not a jail or penitentiary of any State or Territory. However, I am inclined to think that a reasonable interpretation of this statute requires that it should apply to all penal institutions to which the government sends prisoners for confinement.

Coming now to the third class above mentioned, it will be observed that Section 1147 of the Revised Code of Chicago of 1897, if a valid ordinance, expressly authorizes and requires you to put such prisoners to work. Section 9 of Chapter 67 of the Revised Statutes above quoted provides that prisoners of the third class may be committed to the House of Correction and shall be “received and kept in the manner prescribed by law and the discipline of said House of Correction,” and I believe that herein is found authority for Section 1147 above mentioned.

It is undoubtedly true that the superintendent or warden of a penal institution has no authority to inflict on the prisoner any punishment not authorized by law. It has many times been decided that the sentence of a court to punishment not authorized by law is invalid, even if the punishment provided in the sentence is milder than is required by law. Thus, it has been held that where a court sentenced one to transportation for seven years for an offense punishable only by death, such sentence was void.

King v. Bourne, 7 A. & E., 58.

A sentence imposing imprisonment merely, when the law requires imprisonment and fine, has been held invalid, and

so of a sentence of imprisonment at hard labor when the law only required imprisonment.

Daniels v. Commonwealth, 7 Pa. State 371;

Ex parte Pearson, 59 Ala. 654;

Harmon v. United States, 50 Fed. 921;

Stevens v. Commonwealth, 45 Mass. 360.

It is also true, however, that it has been recognized in a number of cases that where a party is sentenced to imprisonment in a particular institution, he is there subject to the same discipline and government as any other prisoner in such institution, and that if the discipline of such institution includes labor, such party will be required to labor as all prisoners are required to labor.

Ex parte Clark, 50 O. S. 649;

United States v. Pridgeon, 153 U. S. 48.

Labor in a penal institution may be regarded either as a punishment or as a method of discipline. If it be regarded as a punishment, then the superintendent of a prison has no power to compel one to work whose sentence does not call for it. If, however, labor be regarded as an incident of discipline, then every prisoner in any institution where labor is so employed may rightfully be compelled to work. It would seem that the better view of the matter is that labor is a means of discipline. It cannot be doubted, for instance, that you have a right to compel prisoners to submit to having their hair clipped; to bathing at regular intervals; to going to bed at a certain hour every evening; to refrain from conversation with their fellow prisoners; to attend divine services on Sunday morning, etc. These and many other incidents of discipline might be named as illustrating the discretion which the superintendent of a prison has in enforcing discipline. In the same way it seems to me entirely proper for a superintendent or board of managers to introduce labor as a part of the discipline of a prison. In fact, it is now recognized by penologists that labor is absolutely necessary to the proper government of a prison, and that it is in fact a cruel wrong to the inmates to deprive them of the opportunity to work.

“The imperative necessity of keeping all prisoners constantly employed in productive labor is a positive law of sci-

tific penology. So inexorable is this law, that its infraction by imprisonment in idleness manifestly results in a much greater social injury than is usually to be feared from the freedom of the criminal under surveillance. It follows that society cannot justly permit convicts to be imprisoned unless it can set them to work. The obligation of the State to provide useful labor for its prisoners is quite equal to its obligation to provide restraint."

Boies, "The Science of Penology", 273.

"The reformation of convicts is well nigh impossible unless they are employed at productive labor," *ibid.* 269.

"Experience has proved also, that enforced idleness in confinement is as unreasonable and cruel as torture. It destroys the physical, mental and moral health, induces disease and insanity, incapacitates the prisoner for honest self-support when liberated, and makes him a life burden or enemy to society," *ibid.* 265.

A careful examination of the various statutes and ordinances quoted, satisfies me that it was the intention of the legislature and of the City Council that all prisoners committed to the House of Correction, should be made to work; and I am, moreover, clearly of the opinion that you have the authority to enforce any reasonable and proper discipline, including labor, and that all prisoners committed to your care are subject to such discipline.

Yours very truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Acting Corporation Counsel.

APRIL 22, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have before me your letter of November 27, 1903, in which you request this department to render an opinion as to whether or not the alley running north from Monroe street

between Dearborn and Clark streets, commonly known as Bradner Smith court, is public property.

Replying thereto, I beg to say that from an examination of abstracts of title and from information gained in conferences with Judge Walker, formerly Corporation Counsel, Attorney Peckham of the National Safe Deposit Company and Secretary Larson of the Board of Education, my conclusion is that the alley in question is not a public alley, but that the east twelve (12) feet thereof is the property of the City of Chicago for the use of schools, and is now under lease for a term of 99 years to the National Safe Deposit Company.

As to the west twelve feet of said alley, my conclusion is that the National Safe Deposit Company owns the same in fee simple, together with the land adjoining said alley on the west. The said alley appears to be subject to private easements of way, for light and air, for freedom from obstruction, by buildings and structures, to the ingress and egress of persons, light and air into, out of and over the same, for the benefit of the owners of the property adjoining said alley on each side. The said easements are appurtenant to the property adjoining said alley on each side.

It does not appear that there has ever been any dedication of this alley to the public, nor that the City of Chicago has ever made any improvements therein, nor attempted to exercise jurisdiction over the same as a public street or alley. The adjoining property owners have kept it paved. The south end was always closed to team traffic by posts set about four feet apart, and while the alley was accessible to pedestrians, still it does not appear that it has ever been used by the general public as a thoroughfare. There is, therefore, no question of prescriptive or common law rights involved.

The National Safe Deposit Company, being the owner of the west half of said alley and the owner of a ninety-nine year term of the east half thereof, and being the owner and term-holder of the property adjoining said alley on each side, as well as of the easements appurtenant thereto, as hereinbefore set forth, has the right to place a building thereon, subject, of course, to removal from said east half at the expiration

of the ninety-nine year period above mentioned, if required by the Board of Education.

As to the west twelve feet of said alley, no reason is perceived why it should be exempt from taxation inasmuch as it is, in my opinion, private property.

Correspondence and plat returned herewith.

Yours truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

APRIL 28, 1904.

MR. L. E. GOSSELIN, Auditor.

Dear Sir:

In your communication of recent date you transmitted the claim of F. M. Charlton as justice of the peace against the city for costs or fees in cases transferred to him from Justice Quinn on change of venue. I return herewith the papers connected with the said claim. The following are the questions raised by your letter:

First. Has a justice of the peace or police magistrate the power to remit fines?

Second. Can a justice of the peace or police magistrate compel the City of Chicago to pay him trial costs or fees when he has dismissed the case or acquitted a person prosecuted for the violation of a city ordinance?

Third. What authority has the comptroller over justices of the peace who have been designated by the Mayor as police magistrates? Can he, for instance, compel them to make monthly or annual reports?

Chapter 53, Section 40 of Hurd's Revised Statutes, 1901, pages 926-927, prescribes the fees of justices of the peace and police magistrates, and provides "that the costs in criminal and *quasi criminal* prosecutions for the violation of an ordinance of an incorporated city or town, where the provisions of the charters of such towns or cities do not prohibit the payment of such costs, may be paid by such city or town in the

discretion of the City Council or Board of Trustees of such incorporated cities or towns."

Section 8, Article 5 of the Cities and Villages Act, gives jurisdiction to justices of the peace and police magistrates over cases arising under said act, or under any ordinance passed in pursuance thereof. It is a general rule that courts cannot remit fines which have been lawfully and finally imposed, as this would amount to an encroachment upon the functions of the executive. (See Am. & Eng. Encyc. Law, Vol. 13, pages 70-71.)

It has been held, however, by our Supreme Court, that a City Council may remit a fine imposed for violation of the city ordinances, where the time allowed the defendant for an appeal has not yet expired, for the reason that until such time expires, the claim against the defendant is one that might be contested and defeated, and it is, therefore, within the power of the City Council to adjust the matter in any manner that seems best. (*Lewistown v. Hummel*, 38 Ill. App. 326. *Agnew v. Brall*, 124 Ill. 312.)

The first question must, therefore, be answered in the negative.

Under Section 40 of Chapter 53 of the statutes quoted above, it has been repeatedly held by our courts that a municipal corporation is not liable for costs made in prosecuting supposed violators of its ordinances, even though the accused be acquitted, and that a judgment for costs cannot be entered against it when the defendant in any such prosecution is acquitted. Under the section of the statute referred to, the costs in criminal and *quasi* criminal prosecutions for the violation of city ordinances may or may not be paid by the municipal authorities within the exercise of their discretion. (*Anderson v. Schubert*, 158 Ill. 75; *Town of Nokomis v. Harkey*, 31 Ill. App. 107; *People v. Village of Chapin*, 48 Ill. App. 643; *Moore v. People*, 37 Ill. App. 641. See also *McArthur v. Artz*, 129 Ill. 352.)

The principle upon which the constitutionality of the section of the statute referred to depends, is that municipalities, such as cities, towns and counties, are instruments of the State to carry out its powers for the benefit of the public and

act as agents of the State in exercising their powers and enforcing public rights. They may, therefore, have extended to them the same exemptions in suits as are vested in the State. (*Holmes v. City of Mattoon*, 111 Ill. 27, and *People v. Village of Chapin*, 48 Ill. App. 643.)

Police magistrates, even though *elected* under the statutes of this State, are justices of the peace in law and in fact, though different in name. (*People ex rel v. Palmer*, 64 Ill. 41; *Brown v. Jerome*, 102 Ill. 371; *McPhail v. The People*, 160 Ill. 77, 84; *Phillips v. Quick*, 63 Ill. 445; *Markham v. Heffner*, 67 Ill. 101; *Taylor v. Smith*, 64 Ill. 445; *Herkelrath et al. vs Stookey*, 58 Ill. 21; *Newberry v. Bowen*, 26 Ill. App. 645. See also *Belton, Admx., etc., v. Fisher*, 44 Ill. 32.)

The constitution of 1870 abolished the office of police magistrate in the City of Chicago. By prohibiting the election of justices of the peace in that city, and providing for their appointment, it, by implication, prohibits the election of police magistrates, who are, in fact, as has been stated, justices of the peace. (*People ex rel. v. Palmer, etc.*, 64 Ill. 41.) This being the law, a city ordinance giving the Mayor the power to designate or appoint, and the act of the Mayor in appointing or designating certain justices of the peace as police magistrates neither adds nor subtracts anything to or from the constitutional and statutory powers of such officers.

An agreement on the part of the City Council of a city to pay costs must clearly appear in order to subject the city to liability and will not be lightly implied. It has been held, for example, that an ordinance providing that persons convicted of breaches of ordinances, shall be required to work out their fines on streets and alleys at a given sum per day, is in no sense an agreement on the part of the city to take labor in payment of the judgment or fines, but is means adopted for compelling their payment in money. Labor performed by persons under such an ordinance is not a payment of the judgment or fines, and the city does not thereby become liable to a justice of the peace, or other officer, for costs in the case in which such persons were tried. (*Fosselman v. City of Springfield*, 38 Ill. App. 296; 139 Ill. 185; *Young v. City of Murphysboro*, 45 Ill. App. 561.)

It is a well known rule of law that the right to tax and recover costs, is purely statutory, and the justice of the peace has not the power to direct that the costs be first paid out of a judgment collected by him before turning it over to the plaintiff, even though a jury so directed. (*Hodge v. The People*, 78 Ill. App. 378, and *People v. Village of Chapin*, 48 Ill. App. 643, 647.)

Under this state of the law, even were the city not specifically exempted from any liability for costs without its acquiescence, it is difficult to see any fair reason why a justice of the peace, who has fined a person found guilty of violating an ordinance, and suspended or remitted the fine, should ask the city to pay him his fee or costs in such a case. Certainly there is no legal liability whatever on the part of the city to comply with the demand or request, and to do so voluntarily would violate the spirit of the statute I have been discussing, which only intends that payment shall be made of such costs as equity and justice require. (*Town of Nokomis v. Harkey*, 31 Ill. App. 107.)

The second question, like the first, then, is answered in the negative, but in leaving it, it seems proper to say that whatever may be the rule as to a so-called police magistrate, who has executed a waiver of the fees to which he is entitled by law, in favor of the city, it is clear that a justice of the peace not designated as a police magistrate, and who has signed no such waiver, is entitled to all fees earned by him in his official capacity, in suits brought before him by the city, which he can collect, and if the city collects them it must turn them over to the justice of the peace. (*DeWolf v. City of Chicago*, 26 Ill. 443.)

Coming now to the third and final question, your attention is called to Section 1544 of the Revised Code of the City of Chicago, which requires justices of the peace appointed to police courts to make daily reports to the comptroller.

Section 1545 of the code provides for salaries for such justices to be fixed by the City Council in lieu of their compensation or fees.

Section 1572 requires a monthly report to the comptroller of fines, etc., and Section 1573 requires monthly set-

lements by justices of the peace who have been appointed to police courts.

In *Coleman v. The City of Elgin*, 45 Ill. App. 64, Judge Cartwright, now a member of our Supreme Court, held:

"1. While municipal corporations may, under their general powers, provide convenient places for the purpose of holding courts for the trial of offenders against police regulations and criminal laws of the State, and defray the incidental expenses of the operations of such courts, whereby both the State laws and the ordinances of the city may be more efficiently and conveniently enforced, there is no absolute duty imposed upon cities to make such provision.

"2. Where a police magistrate rents an office and pays the expenses thereof without the authority or sanction of the city, there being no absolute duty upon its part to provide an office and pay the expenses thereof, he cannot make the city his debtor without its consent.

"3. It is the duty of such officer to provide a place for the performance of his official duties, unless the city sees fit to furnish an office for him.

"4. Where an ordinance provides for the making, by such officer, of monthly reports, and he voluntarily complies therewith by furnishing them, no provision being made for any fee or compensation therefor, he cannot recover for so doing.

"5. While a city has the same right to inspection of the docket of such magistrate, and information as to its litigations, that any other suitor has, it has no right to require of him, as a duty, to furnish such reports as it might dictate."

In his opinion Judge Cartwright said (page 68):

"Police magistrates are officers provided for by the constitution, . . . They are part of the judiciary of the State, to be elected in such districts as are provided by law. Cities are litigants before them, having the same rights and privileges as other suitors, but with no authority or control over them. The city had the same right to inspection of his docket and information as to its litigations that any other suitor had, but had no right to require of him, as a duty, to furnish such reports as it might dictate. The reports were

evidently furnished for mutual convenience, without any intention on the part of appellant to make any charge therefor, or any provision on the part of the city for payment or intention to make payment for them."

The decision quoted from is a correct statement of the law, and requires that the third question be answered in the negative. So that whatever control the City Council, Mayor or Comptroller have over the so-called police magistrates, finds no warrant in law, but depends, and must depend in the future upon their willingness for the sake of the business obtained, to comply with existing and future ordinances of the City of Chicago.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

APRIL 28, 1904.

JOHN R. CAVERLY, ESQ., Justice of the Peace.

Dear Sir:

I have your favor of April 21, 1904, addressed to City Comptroller McGann, in which you request an opinion "as to who should pay for the jury in a case where the City of Chicago is plaintiff and the defendant demands a jury in a private court of a justice of the peace."

In reply thereto, I beg leave to say that it depends on what sort of a suit it is; if it is an ordinary civil suit in assumpsit or for damages wherein the defendant is not liable to be imprisoned for failure to pay the judgment which may be rendered against him, then the defendant would be required to advance the jury fees just as he would be in any other law suit.

If, however, the suit is one for a penalty for the violation of a city ordinance, then the defendant would be entitled to a jury trial even though he should refuse to advance the fees, because otherwise he could not be imprisoned for the non-payment of any judgment which might be rendered against

him unless he waived a trial by jury. (See Paragraph 175, Chapter 79, Starr & Curtis' Ann. Stat.)

Yours truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MAY 4, 1904.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Your letter transmitting copies of statements of John J. Hanberg as Town Collector of the Towns of Hyde Park, Jefferson, Lake, Lake View, South Chicago, West Chicago and North Chicago, of the city taxes collected by him as Town Collector, has been referred to me.

It seems from these statements that Hanberg has retained as his compensation two per cent. of the amount collected as city, school and library taxes.

The revenue act requires the Town Collector to make final settlement for the city taxes charged in the tax books on some day to be named by the County Collector, and following within twenty days after the 10th of March, and upon making that settlement the Town Collector is required to pay over to the city all city taxes then in his hands.

If he retains any such tax, or any portion of it, and makes any profit thereby, the profit is the property of the city, and not of the Town Collector.

The County Collector is required to make settlements with the city and to pay over to the city at that time all the city taxes collected by him. If he retains any part of the taxes and thereby makes a profit, that profit is the property of the city.

By Section 36 of Chapter 53, the fees and salary act, the commissions of the Town Collector are limited to \$1,500 per year.

If he retains any greater sum he is liable on his bond to the party injured. (*Ryan v. People*, 117 Ill. 486.)

The city must, of course, pay its share of the \$1,500, but is entitled to recover from the collector everything over its share of the \$1,500 that he retains out of the city taxes.

This rule applies to the collector in his capacity of Town Collector for each town. However, if the total tax collected in any town is less than \$1,500, he can only retain two per cent. upon the tax actually collected.

The County Collector is entitled to a commission of one per cent. upon city taxes collected by him as County Collector. Where a city tax is collected by a Town Collector and paid to the County Collector, the County Collector upon paying it over to the city, is entitled to a commission of three-fourths of one per cent. It is not probable, however, that any court will permit the County Collector of this county to retain this commission, inasmuch as he is *ex officio* Town Collector.

We believe that the city can recover from the County Collector, upon his bond, the excess over his lawful commissions, and all the profit that it can show he has made out of the city money.

The fact that the County Collector has paid over to the county the interest, or at least a portion of the interest he received for deposits of the county money, will be of service to us in our contention.

Herewith we return the statements transmitted with your letter.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 5, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You have submitted the following query to this department for an opinion: "Does Section 79 of the Election Law apply to primary elections?" Said Section 79 is:

"No spirituous, malt, vinous or intoxicating liquor shall be sold or given away at retail, nor shall any saloon or bar-room, or place where such liquor is so sold or given away, be open upon any general or special election day, within one mile of the place of holding an election. Whoever violates the provisions of this section shall be fined in a sum not less than \$25 nor more than \$100. It shall be the duty of the sheriff, coroner, constables, and other officers of the county, and magistrates, to see that the provisions of this section are enforced."

This section is part of "An Act in regard to elections, and to provide for filling vacancies in elective offices," approved April 3, 1872, in force July 1, 1872. Hurd's Revised Statutes of Illinois, 1903, page 806.

The primary election law entitled, "An act to amend an act, entitled 'An act providing for primary elections of delegates to nominating conventions of political parties or organizations, and to promote the purity thereof by regulating the conduct thereof, and to support the privileges of free suffrage thereat by prohibiting certain acts and practices in relation thereto, and providing for the punishment thereof,'" approved May 11, 1901, contains the following section:

"Section 8. All the laws of this State, respecting the general elections in this State, now or hereafter in force in any election precinct or district in such county, city, village or incorporated town, except as the same are modified by the provisions of this act, and so far as the same are applicable to the primary elections provided for in this act, are hereby declared to be in force in each primary election district respecting the primary elections provided for in this act. . . ."

(Page 888, id.)

I have examined the provisions of said last named act, and find that said Section 79 of the first act is not thereby modified in any way, and as the provisions of said Section 79 are, in my opinion, applicable to primary elections, I am of the opinion that said Section 79 does apply to primary elections,

and that the same should be enforced on primary election days.

Respectfully,

WM. H. SEXTON,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 9, 1904.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

I have your letter of the 5th inst. stating that the committee of the City Council on "Building Department", passed an order directing the Commissioner of Buildings to authorize owners of buildings to construct bay windows, or building entrances, beyond the lot line so as to project over the street, as now authorized by Sections 124 and 125 of the building ordinance now in force; provided, however, that the owner of the building give a bond to the city and the Commissioner of Buildings to indemnify them against loss or injury by any damage that may result therefrom. You ask to be advised if a bond of this character is good in view of the fact that the city has no authority to issue permits authorizing these projections.

There can be no doubt that the city has no authority to authorize the construction of buildings, or any portion thereof, beyond the lot line and occupying a portion of the street. The Supreme Court of Illinois has passed upon this question a number of times, but recently has, in unmistakable terms, pronounced municipal ordinances authorizing the use of the highways for private purposes and for purposes other than for which the highways were created, illegal and void. Those portions, therefore, of Sections 124 and 125 of the building ordinance authorizing the construction of buildings beyond the lot line are void.

The city, then, being without authority to issue the permit, cannot protect itself by the taking of an indemnity bond; nor can you, as a municipal officer, knowing said Sections 124

and 125 to be invalid in this regard, issue the permit and protect yourself by the taking of an indemnity bond. This is not a question of the most politic action by the city and its officers for their own protection, but is a pure question of law upon which there can be no disagreement.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MAY 10, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Your letter of April 18, 1904, duly received, transmitting a communication from the City Engineer asking an opinion as to the validity of the claim of Robert W. Hunt & Company, based upon the following facts:

January 23, 1897, a contract was made between the City of Chicago and Henry R. Worthington for the furnishing of six pumping engines, of a capacity of twenty million gallons of water per day each, under a steam pressure of one hundred and forty pounds, with a piston speed of one hundred and fifty feet per minute. The contract provided that the city should pay for the performance of the contract the sum of \$437,600. The contract proper made no reference to the payment of any bonus or the deduction of any penalty. The only contract price mentioned in the contract was the sum above stated. The specifications, however, which were referred to in the contract and attached thereto, contained the following provision:

"In case any of the engines exceed the duty above prescribed, then the City of Chicago agrees to pay to the contractors, as a reward for the superior efficiency of the engine, the sum of one thousand (\$1,000) dollars for each million foot pounds excess . . . for each engine. In case either engine fails to perform a duty of one hundred and thirty-five (135) million foot pounds per thousand pounds of commer-

cially dry steam during the duty test, the contractors shall pay to the City of Chicago, as an agreed measure of damages for lack of efficiency of the engine, in the ratio of \$2,000 for each one million foot pounds which the duty falls below one hundred and thirty-five million."

The specifications also contained a provision for a penalty of \$100 per day for delay in completion of the contract.

On the first day of February, 1897, a contract was made between Robert W. Hunt & Company and the City of Chicago for the inspection of said engines, the superintendence of the erection thereof, and the making of tests for duty and capacity as provided for in the specifications. This contract contained the following provision:

"The party of the second part is to pay to the party of the first part a sum equal to two per cent. of the contract price between the aforesaid Henry R. Worthington and . . . the City of Chicago."

It now appears that in addition to the contract price of \$437,600 the city has become liable to pay, and has paid, to Worthington \$45,000 bonus on account of the fact that the engines exceeded the duty of one hundred and fifty million foot pounds. Hunt & Company, who have faithfully performed their part of the contract with regard to inspection, tests and superintendence, now claim two per cent. of this bonus, and the question to be decided is whether or not the contract to pay Hunt two per cent. of the "contract price" includes and embraces the bonus or "reward" referred to above.

The work to be performed by the inspectors would have been the same whether the engines developed an excess over the required duty or a deficiency thereunder. If the engines had fallen short of the duty required, I think it would not be a tenable interpretation of the words "contract price" to construe that expression to mean the sum mentioned in the contract less the penalty. Again, if there had been such delay in the construction of the engines that the time penalty had been put in force against the Worthington Company, so that the amount which they were to have received under the contract was largely reduced on account of such delay, I think

it would hardly be a fair interpretation of the inspection contract that the percentage should be paid only on the amount of money which the Worthington Company became entitled to receive upon the completion of the contract. Such interpretation of the contract would be not only inequitable and highly prejudicial to the inspectors, materially reducing, as it would, without any fault on their part, the amount of money which they were to receive for the work of inspection, and that, too, without reducing the amount of the work and the expenses thereof, but it would also be a material departure from the literal meaning of the words used. It would be the substitution of the words "the amount of money received" for the words "contract price." The position which Hunt & Company now take in asking for the payment of the commission upon this bonus or "reward for efficiency", in my opinion, stands exactly upon the same ground. They also seek to substitute for the words "contract price" the words "the amount of money which Worthington shall become entitled to under the contract," or words of similar purport.

While the words "contract price" might in a proper case be construed to mean the sum of money which may become due under the terms of the contract, yet these words are equally susceptible of being construed to mean the specific sum of money mentioned in the Worthington contract, to-wit, the sum of \$437,600. It may be urged that this language was used for the purpose of insuring to Hunt & Company payment of a percentage upon said sum, without deduction or diminution, resulting from the operation of the penalty clause, in which case it would equally follow that the compensation would not be affected by the accruing of the "efficiency reward."

There is another consideration which influences me in construing the words "contract price" in the Hunt contract to mean the specific sum of \$437,600 mentioned in the Worthington contract. Hunt & Company were by this contract made appraisers or arbitrators on behalf of the city for the determination of the capacity and efficiency of the engines. To construe their contract, therefore, as authorizing them to receive a percentage upon the reward for additional efficiency

determined by them as such appraisers would be to put them in a position where their duty of faithful representation of the city's interests would be in conflict with their own interests. A construction of their contract leading to such a conclusion ought not to be adopted, unless the clear language of the contract compelled, and I am strongly inclined, therefore, to the choice of the second of the two possible constructions referred to at the beginning of the foregoing paragraph.

If, however, there be here presented a case of two alternative or debatable constructions, I deem it to be the clear duty of the disbursing officer to adopt that construction most favorable to the city, but at the same time to expedite the submission of the disputed question of construction to judicial determination with the least delay and expense possible. I suggest, therefore, that you do not assume the responsibility of payment of the percentage on this additional sum, but that you express to Hunt & Company the willingness of this department to submit the matter upon a stipulation of facts, to some judge of the Circuit or Superior Court to be selected for the purpose, the case to be tried on said stipulation, promptly, without the intervention of a jury and without delay.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 19, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have your communication requesting the opinion of this department as to whether under the provisions of Section 3 of the so-called wine room ordinance passed December 9, 1901, it is a necessary condition precedent to granting a new license to a saloonkeeper whose license has been revoked over two years ago for the violation of this section that you first restore to him his old license. The section of the ordinance in question provides:

"Section 3. Any person or corporation violating any of the provisions of this ordinance shall, upon the conviction

thereof, be fined not less than ten (\$10) dollars, or more than one hundred (\$100) dollars for each offense; and provided, further, that in any case where any person or corporation maintaining or conducting a saloon, dram shop, restaurant, cafe, dining room, ordinary or victualing place at or in which malt, vinous or intoxicating liquors of any kind are sold, given away, or otherwise dealt in, shall violate any of the provisions of this ordinance, in addition to the penalty above fixed, such person or corporation shall have his, her or its license revoked, and shall not be permitted to again obtain a license to operate, conduct or maintain a saloon, dram shop, restaurant, cafe, dining room, ordinary or victualing place, or any other place at or in which malt, vinous or intoxicating liquors are sold, given away, or otherwise dealt in, within the limits of the City of Chicago, for a period of two (2) years from and after the date of the conviction of any such person or corporation of the violation of any of the provisions hereof."

Under the provisions of this section, the restoration of the saloonkeeper's old license is neither necessary nor proper before granting him a new license. Were it necessary for you before granting a new license to restore the saloonkeeper's old one, you would then be giving him permission to keep a dram shop under exactly the same conditions which obtained at the time you originally revoked the license. To require any such action on your part would be an absurdity, for, as suggested in your communication, the change of location of the proposed dram shop may well operate as a consideration with you in the exercise of your discretion in the issuance of saloon licenses, while the restoration of the old license would give the licensee permission to maintain the saloon at the identical location at which the ordinance violations had occurred.

Not only is the section of the ordinance in question, or any of the provisions of the general ordinances of this city, silent as to any such condition precedent as the restoration of the old license before a new one is issued, but I am of the opinion that no such implication can be legitimately interpolated to add to their plain terms. The penalty for the viola-

tion of Section 3 of the ordinance is in part the revocation of the license, and the placing of the offender beyond the possibility of obtaining this privilege for a period of two years. After the expiration of this period it is entirely within your discretion to grant a new license to such saloonkeeper without restoring to him his old license.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 12, 1904.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

I have a communication from you of recent date requesting the opinion of this department as to whether under certain provisions of the city ordinances police magistrates can be compelled to hold two sessions of court daily and abstain from hearing cases other than those brought before them in their capacities as such magistrates.

In order to better understand the questions involved, it may not be amiss to touch briefly upon the history of the office of police magistrate. This office is not mentioned by name either in the constitution of 1818 nor in that of 1848. Section 8, Article 4 of the constitution of 1818 provided that "a competent number of justices of the peace shall be appointed in each county in such manner as the General Assembly may direct whose time of service, power and duties shall be regulated and defined by law." Section 1, Article 5 of the constitution of 1848 disposes of it under judicial power of the State as follows:

"The judicial power of the State shall be and is hereby vested in one Supreme Court, in Circuit Courts, in County Courts and in justices of the peace, provided that inferior local courts of civil and criminal jurisdiction may be established by the General Assembly in the cities of this State; but such

courts shall have a uniform organization and jurisdiction in such cities."

By Section 27 of the same article provision was made for the election in each county of the State in such district as the General Assembly might direct, by the qualified electors thereof of a competent number of justices of the peace who should hold their offices for the term of four years and until their successors should be elected and qualified, and who should perform such duties and receive such compensation and exercise such jurisdiction as might be prescribed by law.

In 1854, presumably in consequence of the growing need of an increased number of inferior magistrates in the cities and towns of the State, the General Assembly passed an act providing for the establishment, in each of the cities of the State, of an inferior court of civil and criminal jurisdiction to be called "Police Magistrate's Court", and providing for the election in each of the incorporated towns and cities of the State, according to population, of from two to three officers to be authorized police magistrates, such officers to be elected, commissioned and qualified in the same manner and to hold their offices for the same term and to exercise the same jurisdiction as justices of the peace.

The constitution of 1870 recognizes and names the office of police magistrate. Section 21, Article 6, is as follows:

"Justices of the peace, police magistrates and constables shall be elected in and for such districts as are or may be provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform."

Since the adoption of the constitution of 1870, Section 15 of Article 11 of the General Law for the Incorporation of Cities and Villages provides that:

"There may be a police magistrate elected at a regular election in each village who shall give bond, qualify and hold his office for four years and until his successor is elected and qualified."

At present justices of the peace are appointed in the City of Chicago under the provisions of Section 28, Article VI. of the Constitution of 1870, which is as follows:

"All justices of the peace in the City of Chicago shall be

appointed by the Governor by and with the advice and consent of the Senate (but only upon the recommendation of a majority of the judges of the Circuit, Superior and County Court), and for such districts as are now or shall hereafter be provided by law. They shall hold their offices for four years and until their successors have been commissioned and qualified, but they may be removed by summary proceeding in the Circuit or Superior Court, for extortion or other malfeasance. Existing justices of the peace and police magistrates may hold their offices until the expiration of their respective terms."

In *People v. Matteson*, 17 Ill. 167, it is held that the constitutional name of the office of police magistrate was "justice of the peace."

In *Herkelrath et al v. Stookey*, 58 Ill. 21, the Court says:

"This court has held that these officers (police magistrates) are, under the constitution and the law, justices of the peace. By changing the name of things their nature or qualities are in no wise changed. Calling these officers magistrates does not render them any the less justices of the peace."

It thus appears that justices of the peace and police magistrates, although acting at times under different titles, fill, in fact, the same office. The term "justice of the peace" is a generic term which includes police magistrates as a subordinate class.

The appointment of certain justices of the peace to act as police magistrates in the City of Chicago by the Mayor is not by any statutory or constitutional authority, but is done merely for the purpose of bringing the city's cases before a competent justice of the peace in a manner most economical for the municipality.

The subject of police magistrates is dealt with in the Municipal Code under Chapter 52, Section 1539, *et seq.* Section 1542 provides:

"1542. (Qualifications of justices, sessions of court.) The justices so designated shall be justices of the peace in the City of Chicago; and when so designated and qualified, shall hold two sessions of court daily, Sundays excepted, one in the morning and one in the afternoon; and one of said courts in

each of the three divisions of the city shall be in continuous session.”

Section 1544 provides for a daily report by the magistrate to the Comptroller. Section 1545 provides:

“1545. (Compensation of officers—fees paid to city.) The said justices, clerks and bailiffs shall be compensated by salary, to be fixed by the City Council, for doing the business of said police court, in lieu of any and all other compensation or fees whatever accruing from the business to be disposed of, and they shall not enter upon the performance of their duties unless they first sign and execute an express relinquishment in writing, in favor of the city, of all fees, emoluments or compensation whatever, other than what may be provided by a salary, to be fixed, as aforesaid, by the City Council, and such relinquishment shall be filed in the Comptroller’s office; said justices so appointed as police magistrates shall have no other office or place of business, and shall devote their whole time to their duties as such magistrates, and shall not hear or in any way entertain any civil suit or procedure or any business whatever, except such as shall regularly come before them as such magistrates. Said justices so appointed, as aforesaid, shall account for and turn over to the City of Chicago all moneys received by them for the issuing of all writs and processes, the making of all orders and the approval of all bonds, and all moneys received by them for any duty or act performed by them as such police magistrates shall be paid into the city treasury. For a failure to pay over such fees, costs and moneys so received, the Mayor shall remove such justice from office as police court magistrate.”

The agreement entered into by a justice upon his appointment as police magistrate obligating himself “to hold such police court on all days except Sundays and legal holidays during his term of office from the hour of 9 o’clock a. m. until all cases set for trial are disposed of” is in no sense an agreement to hold two sessions daily or to abstain from the hearing of outside causes. Section 1542, quoted above, does require them to hold two sessions of court.

In *Coleman v. City of Elgin*, 45 App. 64, the Court, in passing upon the right of the city to compel a justice of the

peace to furnish reports to the city officials say upon page 68:

"Police magistrates are officers provided for by the constitution. . . . They are part of the judiciary of the State, to be elected in such districts as are provided by law. Cities are litigants before them, having the same rights and privileges as other suitors, but with no authority or control over them. The city had the same right to inspection of his docket and information as to its litigations that any other suitor had, but had no right to require of him, as a duty, to furnish such reports as it might dictate. The reports were evidently furnished for mutual convenience without any intention on the part of appellant to make any charge therefor, or any provision on the part of the city for payment or intention to make payment for them."

I can find no warrant for the assumed power in Section 1542 to require police magistrates to hold two sessions of court daily. Answering the remaining portion of your inquiry as to the ability of the city to compel the justice to confine himself to the hearing of those cases which come before him in his capacity as police magistrate, such power, if any, is to be sought in Section 1545, quoted above. I am of the opinion that this section is invalid, not only because the city is without power to make such requirements of justices of the peace, but from the further fact that by reason of his position as a part of the judicial power of the State, a justice would be compelled to a certain extent to hear and entertain any cause which might be properly brought before him, and could not, in view of his position, bind himself to hear only one class of cases.

Consequently I am of the opinion that there is no legal obligation upon a justice to confine himself to the hearing of cases which come before him as a police magistrate, and regarding the title of his position as a police magistrate as synonymous to that of a justice of the peace, I am of the opinion that the City Council has no authority over this class of judicial officers.

However, it may further be said upon this question that there can be no practical objection to the city's entering into an agreement with certain justices of the peace to transact

the city's business at a saving to the city of considerable money and obtaining for this service justices who are thoroughly competent to perform the work required.

While a justice of the peace cannot be compelled to give up his entire time to the city's work to the exclusion of other litigation, I think he may legally agree to devote a greater portion thereof in sitting as a police magistrate, nor is there anything objectionable in an arrangement with the justice whereby the city is enabled to save a large amount of money for the taxpayer. The only control which the city may lawfully exercise, in such circumstances, is by declining to bring its suits before a justice who does not comply with the requirements of the present system, and by taking its cases before a justice who will acquiesce in the system.

Upon the technical legal objections to the ordinance which I have raised in the foregoing opinion, I do not wish to be understood as opposing the practical utility of such system or the exercise of such control with a view to securing greater efficiency and economy in the administration of justice in municipal courts.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

. MAY 20, 1904.

WILLIAM H. MUSHAM, Esq., Fire Marshal.

Dear Sir:

I have your letter of the 17th inst., asking this department to advise you as to the mode of procedure to adopt where the managers of a theater refuse to pay the city for the services of two firemen who have been stationed at the theater in question, in compliance with the new theater ordinance.

Quoted Section 45 of Section 1 of the ordinance adopted January 18th, 1904, amending the building ordinance of March 28th, 1898, and amendments thereto, is as follows:

"Sec. 45. *Employment of firemen—duties of firemen.*—

It shall be the duty of the person, firm or corporation maintaining or operating a theater in every building of Class V. to employ two or more competent, experienced firemen, who shall be detailed by the fire marshal, shall be in the uniform of the Chicago Fire Department, shall be on duty at each theater during the whole time it is open to the public, shall report to and be subject to the orders of the fire marshal, shall see that all fire apparatus required by this ordinance is in its proper place, in proper condition ready for use, all exits unlocked during the whole time such theater is open to the public, and all in efficient and ready working order. Said firemen and said fire marshal shall require a drill of the employes of said theater for the use of all apparatus and appliances for the prevention of fire inside the building at least twice in every week, and said firemen shall report to said fire marshal the manner and efficiency of said drill. Said firemen shall report in writing daily to the fire marshal the condition of the theater to which they are detailed, and its equipment. No firemen shall be on duty at any one theater for a period longer than two weeks."

As I understand the case from information received from Assistant Chief Burroughs, you, in compliance with the request of the managers or owners of two certain theaters in this city, some two or three months ago detailed two or more competent, experienced firemen to duty at each theater during the whole time it was open to the public; that the firemen so detailed by you were on duty at said theaters during the whole time they were open to the public and performed the duties prescribed by said section of the ordinance; that the firemen so detailed by you drew their regular salaries from the city, and your department rendered statements to said theaters, but that the theater managers or owners refused to pay the bills, and you now ask what procedure you should adopt. In reply I beg leave to advise you that you should at once withdraw the details of firemen to said theaters until such time as said theaters comply with the ordinances. I understand that the bills you rendered to said theaters were reasonable. It would take considerable assurance for any theater manager or owner to argue that said section of the ordinance contemplates that the

firemen shall be detailed to them without charge. The word "employ" used in said ordinance has a definite meaning, and that definite meaning is that the person, firm or corporation owning or operating the theater shall pay for the services rendered by said firemen in insuring adequate fire protection to the public who pay for the privilege of visiting said theaters. If you charged an exorbitant fee for the services of such details, you would be unable to collect, but it surely cannot be said that the fees charged by you are exorbitant. I am unable to comprehend the position the specific theaters have taken, but I am sure it is one that cannot be tolerated by you or the public.

Having withdrawn said detail of firemen, you should enforce the other provisions of said ordinance.

Quoted Section 51 of Section 1 of said ordinance is as follows:

"The Commissioner of Buildings, the Fire Marshal or the Superintendent of Police shall have the power, and it shall be their duty to order any building of Class V. *to be closed where it is discovered that there is any violation of the provisions of this ordinance, until the same are complied with.*"

Quoted Section 52 of Section 1 of said ordinance is as follows:

"Upon the report to the Mayor by the Department of Buildings, Fire Marshal or the Superintendent of Police, that any requirement of this ordinance governing buildings of Class V., or that any order given by them in regard thereto has been violated, or not complied with, in any such building, the Mayor shall revoke the license of such theater or place of public amusement and cause the same to be closed."

In my opinion, the refusal to pay the reasonable charges for the services of firemen detailed to said theaters during the time they were open to the public, for the purpose of insuring adequate fire protection to the public, constitutes a flagrant and willful violation of the provisions of said ordinance, and I, therefore, recommend that upon the withdrawal of the detail by you for a failure to pay such charges, and an attempt to conduct said theaters without the presence of two or more firemen detailed by you, you immediately order said building

closed, and that you report to the Mayor the violation of the ordinance, and request the Mayor to revoke the amusement licenses for the operation of the same.

Section 216 of the building ordinance of March 28th, 1898, is as follows:

“Any person, firm, company or corporation who violates, disobeys, omits, neglects or refuses to comply with, or who resists or opposes the execution of any of the provisions of this ordinance, shall be subject to a fine of not less than \$25, nor more than \$200; and every such person, firm, company or corporation shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue, and shall be subject to the penalty imposed by this section for each and every separate offense; and any builder or contractor who shall construct any building in violation of any of the provisions of this ordinance, and any architect designing or having charge of such building who shall permit it to be so constructed shall be liable to the penalties provided and imposed by this section.”

The managers and owners of said theaters are guilty of violations of said ordinance, and I, therefore, further recommend that prosecutions be instituted at once against them to collect the penalties prescribed by said section 216, and that suits be instituted to collect the money due for services rendered by the said firemen, who have been paid by the city for the time occupied by them in performing the duties prescribed by the building ordinances at said theaters.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MAY 20, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your letter of May 12th, in which you inquire whether it is the duty of the property owners or the railroad

company to keep in repair the sidewalk on the north side of the Ogden avenue viaduct over the Pennsylvania, Northwestern and Chicago Terminal tracks, I beg leave to say:

August 5th, 1901, my predecessor, Hon. Charles M. Walker, in an opinion addressed to the Commissioner of Public Works, said:

"This department has held that there is a duty on the part of the railway companies whose tracks are spanned by a viaduct to maintain and repair it at common law and under the statutes of this State, and that this duty extends to and covers necessary repairs on the approaches to the viaduct."

October 26th, 1901, I addressed a written opinion to the Board of Local Improvements, as its attorney, which said opinion was approved by Hon. Charles M. Walker, Corporation Counsel, that the obligation to maintain and repair viaducts included all the portions of the approach.

July 29th, 1903, Assistant Corporation Counsel Beckwith wrote an opinion addressed to John Ericson, City Engineer, in which he referred to the foregoing opinions, and cited, in addition, a decision of Judge Chytraus, reported in the Corporation Reporter for July 12th, 1900, in which, after an exhaustive review of the authorities cited, the learned judge held that there was a well defined obligation at common law on the part of the railroad company to keep in repair the viaducts which span its tracks; holding further, that this obligation covered not only a portion of the structure, but the whole crossing, or viaduct, including all approaches. This opinion was approved by me.

In view of the fact that the obligation to repair and maintain the Ogden avenue viaduct appears to rest not upon an ordinance-contract, but upon a common law liability, it may be that a special assessment proceeding *might* be maintained, that right having been denied only in those cases where the obligation rested upon an ordinance-contract; but a serious question exists on this point. Unless the situation is such that the safety of the public will not permit waiting until the railway companies can be forced to repair the sidewalk, the special assessment proceedings ought, it seems to me, to be abandoned and resort had by proper remedies to the obligation of the com-

panies. I am of the opinion that mandamus will lie in such case to summarily compel the discharge of this duty.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 21, 1904.

MR. ARTHUR W. O'NEILL, Secretary Special Park Commission.

Dear Sir:

Answering your letter of recent date, in which you inquire whether or not the appropriation item hereinafter referred to is exempt from the operation of the ordinances with regard to the Department of Supplies and the ordinances and statutes in reference to the Civil Service Commission, I beg leave to say:

Said item appears on page 2555 of the Council proceedings of March 7th, 1904, and is as follows:

"For maintenance of temporary playgrounds for children during vacation, to be expended under the direction of a special committee on school grounds on vouchers approved by the Commissioner of Public Works, \$1,000."

The ordinance creating the Department of Supplies was passed January 17th, 1898 (C. P. 1424), and amended March 28th (C. P. 2094). This ordinance creates the office of "Business Agent", makes him the head of said department, and provides (Section 6 as amended):

"He shall make all purchases of supplies and materials for the use of the city and shall let all contracts for labor to be performed for the city in cases wherein the cost of said supplies, materials or labor shall be less than the sum of \$500. Requisitions shall be made for all purchases to be made and all contracts to be let by said business agent as herein provided, and said requisitions shall be so approved in writing by the heads of the departments for which the same are required. . . ."

"Section 8. Said business agent shall receive all bills for supplies, materials and labor furnished upon orders issued by him, and shall certify to their correctness as to prices, extension and totals. He shall present the same to the heads

of the departments, receiving said supplies, materials or labor for certification and approval, and when so certified and approved the said bills shall be presented to the Comptroller for payment."

The appropriation ordinance above referred to was passed subsequent to the passage of the ordinance and amendments above cited, creating the Department of Supplies and the office of business agent and defining his duties.

The question propounded to me is whether or not the appropriation ordinance aforesaid, by reason of the provision that the item "be expended under the direction of a special committee on school grounds on vouchers approved by the Commissioner of Public Works," supersedes the prior ordinances above cited. I am of the opinion that it does not. I see no reason why the money may not be expended "under the direction of" said committee and "on vouchers approved by the Commissioner of Public Works," and yet the actual purchases of the supplies and materials and the contracts for the labor to be performed for which payment is to be made from said appropriation be made and let by the business agent. The ordinances aforesaid and the provisions of the appropriation item can be reconciled by requiring said committee to make requisition on said business agent for such supplies, materials and labor, such requisitions to bear the the approval of the Commissioner of Public Works and the vouchers also to be submitted to him for his approval.

Where legislative provisions present an apparent conflict, and yet are susceptible of a reasonable and practical construction which harmonizes them and allows both to stand, well settled principles of statutory construction require this to be done. These rules apply equally well to city ordinances.

You will, of course, understand that this opinion applies only to the purchase of such supplies and materials and to contracts for such labor as come within the terms of the aforesaid ordinance.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

MAY 23, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have before me an ordinance, submitted by you to this department for an opinion as to its validity, which contemplates the creation of a division of the Department of Police to be known as the Police Signal Service Bureau.

Section 1 of the ordinance creates the division and enumerates the members thereof.

Section 2 defines the duties of the chief operator of the bureau.

Section 3 establishes different grades of operators and the persons who shall be classified therein.

Section 4 provides that the bureau shall "be made a part of the regular police force of the City of Chicago and each member thereof shall be regular policemen," and makes further provision for badges to be worn by the members.

Section 5 repeals conflicting ordinances.

This ordinance is objectionable for many reasons, but it will be sufficient for the purposes of this opinion to point out its illegality in two respects:

Section 4 of the ordinance attempts to transform a police telephone operator into a regular police officer and member of the regular police force of the city. To so do would be in contravention of Section 1, Rule 10 of the Civil Service Rules, ninth annual report, 1903, page 67, which provides that:

"All original appointments on the police force shall be as second class patrolmen. Every applicant for the uniformed police force, in addition to the requirements specified in Section 1 of Rule 3, must at the time of such examination be between twenty-one and thirty-five years of age and not less than five feet seven inches in height (in his bare feet), and of a weight which shall fall within the limits below prescribed, and have a quiescent chest measurement of not less than the figures given below. . . ."

The rule thus provides for all original members of the police force of the city.

The provisions of Section 4 of the ordinance apply to a

class of individuals who are not second class patrolmen, but simply employes of the police department, differing in their status in no way from police matrons, hostlers, clerks, laborers and other employes of the police department. To raise this class of employes to the grade of members of the police force would be in direct conflict with the rule of the Civil Service Commission, above quoted, and as a practical question, viewed from the standpoint of maintaining an efficient police force, is open to objections which need not be pointed out to you. It is sufficient to say that the police department has wisely required certain physical standards of applicants which are not required of the employes known as "operators", and the ordinance would admit to membership in the police department a class of men concerning whose physical qualifications for duty neither the Civil Service Commission nor the Superintendent of Police could be previously acquainted from examination. It is obvious that the police *force* of the city is no more open, through means of the passage of an ordinance of this character, to telephone operators than it is to clerks or laborers.

The second legal objection to the ordinance is that by changing the status of operators to that of members of the police force a conflict arises with the act entitled "An Act for the Creation, Formation and Disbursement of the Police Pension Funds," passed May 16th, 1903. This act provides that members of the police force having served for various periods of time, or having received certain injuries in the discharge of their duties, may apply and shall be eligible for pension. The language employed in the statute, as has been frequently held by this department, clearly means that only those shall be eligible for the pension lists who are *members of the police force*, in the sense of police officers in active duty, the discharge of whose functions entails risk from violence or exposure. To make, by ordinance, the class known as "telephone operators" participants in and beneficiaries of the pension fund would be clearly foreign to the intent of the framers of the police pension act.

The purposes of the proposed ordinance are plainly to enable the class embraced therein, first, to enjoy the benefits

of the police pension fund, and, secondly, to have their duties and positions more specifically defined. The first of these objects is totally at variance with the spirit of the police pension law, as I have pointed out.

Concerning the necessity or desirability of any further classification or designation of the duties of this class, I need only call your attention to the report of the General Superintendent of Police for the year 1903, wherein, on pages 64 and 115, a summary of the duties performed by the police alarm telephone service is given. From these reports I think it sufficiently appears that the necessity for any change or classification of this branch of employees does not exist.

In my opinion, the proposed ordinance in question would be invalid.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MAY 23, 1904.

MILTON J. FOREMAN, Esq., Chairman Committee on Local Transportation of the City Council.

Dear Sir:

May 16th, 1904, the following order was referred to the Committee on Local Transportation:

“ORDERED, That the Commissioner of Public Works be and he is hereby directed to issue a permit to the Union Traction Company to lay an additional rail parallel to, and the proper distance from, the one now used on South Fortieth avenue, from West Taylor street to West Madison street. This permit is revocable at any time upon the order of the Mayor.”

Alderman Scully, who presented said order, to-day requested this department to prepare the necessary permit to the company mentioned for the additional track and to incorporate in said permit whatever provisions this department may deem necessary for the protection of the interests of the city in this

specific instance, and in the pending traction litigation and the traction question in general.

The proposition submitted is one, however, of such importance to the interests of the city that I have not considered it advisable to comply with said request in the absence of directions from your committee as to the questions of policy involved, and I therefore submit the following for your consideration :

February 18th, 1895, the City Council of the City of Chicago passed an ordinance granting certain rights and privileges to the Ogden Street Railway Company, which ordinance was accepted March 11th, 1895, and is printed at page 1544, *et seq.* of the Special Ordinances of Chicago of 1898. Said ordinance authorized said company, its successors and assigns, to lay down, construct, maintain and operate, for the period of twenty years from the date of the passage thereof, a single or double track street railroad, with all necessary and convenient turn-outs, side tracks and switches in certain streets therein named, among them being West Fortieth street, or Crawford avenue, from the north line of West Madison street to the center line of West Thirty-first street. It appears that the company constructed a single track on said West Fortieth street, from West Madison street to West Taylor street, and a double track south from West Taylor street; and that but one car was operated over said single track. It is now claimed by Alderman Scully that the service is inadequate, and that by the laying of an additional track on said street between said points more cars can be operated and the service will be thereby considerably bettered.

Two very serious propositions immediately present themselves for consideration if in the opinion of your committee the additional privilege is to be allowed. The first is, to whom the grant should be made, and the second, for what period of time, and on what conditions. The first is occasioned by the fact that the Chicago Consolidated Traction Company, by deed and bill of sale of February 25th, 1899, acquired all the railroad property, ordinance and franchise rights of the Ogden Street Railway Company, and that there is nothing of record showing a transfer of the rights thus acquired to the Chicago

Union Traction Company. Your honorable committee is undoubtedly informed of the fact that Judge Ball, of the Superior Court, in the so-called "Transfer Cases" held that there was a practical identity of operation between the Chicago Union Traction Company and the Chicago Consolidated Traction Company, and that because of that identity of operation, transfers must be given between said companies for one continuous passage for one fare; and also that the Supreme Court affirmed said opinion. The legal representatives of the Chicago Union Traction Company have not pretended that the Chicago Union Traction Company owned the lines acquired by the Chicago Consolidated Traction Company, but have admitted their operation of said lines. It is, then, to be determined to whom this grant should be made.

Alderman Scully also states that the Chicago Union Traction Company, if given this additional privilege, will accept the same subject to a condition that it is revocable at any time at the option of the Mayor. I have no information on this subject, and it is for your honorable committee to determine whether a plain grant, terminable at will by the city, shall be made, or an ordinance should be passed for a fixed term, comprising all the usual provisions in grants of this character, together with a compensation clause and provisions for city purchase.

I might add that this department has heretofore held that where a company has constructed its road and has not availed itself of the full privileges granted, it has exhausted its rights in so constructing it, that is to say: This ordinance granted the right to lay a single or double track; the company laid a single track on said street between said points, and by so doing, in my opinion, has lost the right to now lay an additional track. Judge Tuley, of our Circuit Court, in the Northwestern Elevated litigation, sustained this position. On the other hand, if the public needs require it, I think the city might, in the exercise of its police power, compel the putting in of a double track railway.

I respectfully submit the foregoing, and will be pleased to take the matter up with your honorable committee at any time.

Yours very truly,

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 24, 1904.

MR. FRANK I. BENNETT,

Chairman Committee on Finance of the City Council.

Dear Sir:

I have before me your letter of May 16th, 1904, in which you call the attention of this department to the proposed repeal of the ordinance creating the Paymaster's Bureau, and in which you request that we "advise this committee what, if any, liability will rest upon the city for salaries appropriated for employes of this bureau, and whether, if the work is transferred to the Comptroller's office, the same men will be entitled to be employed."

Replying to your inquiry, I beg leave to say that the power of the city to abolish any civil service position has been recently reaffirmed by the Appellate Court of the First District in an exhaustive opinion in the case of *People ex rel. Byrne v. City of Chicago et al.*, Appellate Court case No. 11130. I think it can no longer be questioned that the city has this power and that, consequently, there is no liability for the salaries appropriated for the positions abolished.

As to the second branch of your inquiry, I beg leave to say that if the duties of the positions abolished are transferred to other persons in the city's employ and are thereafter discharged by such persons without additional expense to the city, then the persons previously holding such abolished positions would have no right to be employed in the Comptroller's office to do such work. *People ex rel. Byrne v. City of Chicago, supra.* If, however, the Comptroller would be obliged to employ additional men to do the work required by the ordinance to be done by the employes of the Paymaster's Bureau, then, in my opinion, such employes of said Paymaster's Bureau would be entitled to be employed; at least to the extent that additional employes are necessary in the Comptroller's office for the

work specified in said "Paymaster's Ordinance." *City v. Luthardt*, 191 Ill. 516; *Kipley v. Luthardt*, 178 Ill. 525.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 26, 1904.

MILTON J. FOREMAN, Esq., Chairman Committee on Local
Transportation of the City Council.

Dear Sir:

In supplement to my letter of May 23, 1904, in regard to proposed double track in South Fortieth avenue, from West Taylor street to West Madison street, I beg leave to say:

Your committee instructed me to submit for consideration a form of order which would authorize the construction of a double track on said portion of said avenue, properly guarded to preserve all the rights of the city, and at the same time to express my opinion as to the effect of the passage of such an order on the general question of the relations of the Union Traction Company and the city so far as concerns the pending litigation.

I have repeatedly stated that, so far as the action of the Law Department was concerned touching any matter of policy, I should never take the responsibility of recommending anything from which it might follow as a consequence that the rights of the Union Traction Company were in any way added to, strengthened or made more valuable, so long as said company was insisting upon and refusing to waive its unconscionable claims under the so-called "Ninety-nine Year Act." On the other hand, I should not hesitate to recommend the exercise of the police power for the control of the company and its receivers on all those streets where its rights were wholly disassociated from the so-called "Ninety-nine Year Act" claims.

In the matter under consideration I understand that there exists an immediate pressing public necessity for the paving

of South Fortieth avenue. The adjustment of tracks and the determination of whether there shall be a single or a double track street railway are matters which must be passed upon before the street is paved. I understand, further, that the transportation service offered by the Union Traction Company on all of said South Fortieth avenue is hampered and made insufficient by reason of the stretch of single track in the portion of the avenue referred to above. If these facts are as stated, the putting of a double track at this point is a matter of such benefit to the city and its citizens that the action of the City Council is more properly an exercise of its police power than the granting of additional privileges. In view of the fact that the ordinances under consideration can, by no stretch of the imagination, be claimed under the "Ninety-nine Year Act", and undisputedly have eleven years yet to run, I cannot see that the passage of the order under consideration will be of any prejudice or embarrassment to the rights of the city in the pending litigation. I have accordingly drawn and herewith submit to you a form of order, which, if the City Council should see fit to pass, will I believe not prejudice the city's rights.

Lest this letter should at any time hereafter be considered as a precedent, permit me, for the sake of avoiding any future misunderstanding, to reiterate that where the street railway rights then under consideration are claimed by the Union Traction Company as part of a system operated by it under State grants, and not under municipal grants, or where any of the questions at issue in the pending so-called ninety-year litigation are directly or indirectly involved, I shall, if asked to express an opinion, always maintain the position which I have heretofore uniformly maintained, that in such cases nothing should be done to add to the rights or privileges of the company.

Very respectfully submitted,

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 26, 1904.

ARTHUR R. REYNOLDS, M. D., Commissioner of Health.

Dear Sir:

I have your favor of May 19, 1904, transmitting letter from Perry L. Hedrick, Chief Sanitary Inspector, in which he inquires as to whether or not there is any conflict between Section 1088 of the Revised Code of Chicago of 1897, and Section 7 of the Act of June 17, 1893 (Section 2874, Revised Code), in regard to the meaning of the term "work-shop."

Replying thereto, I beg leave to say that the said ordinance defines a workshop as "any house, room or other place in which the process of making, altering, repairing or finishing any so-called ready-made coats, vests, trousers, overcoats, or any other sort or description of wearing apparel intended for sale, shall be carried on." This definition is for the purpose of licensing and inspection by the Department of Health. Under this definition it matters not that custom tailoring may be done on the premises; if the making, altering, etc., of ready-made garments is also carried on, the place is a workshop within the meaning of the ordinance.

The definition of workshop in the State law is more comprehensive than that in the city ordinance, since it includes not only places where ready-made garments are made, but also any other class of garments, as well as a number of other articles. It will be seen, therefore, that a place may be a "workshop" within the purview of the State Factory Inspection Law and not a "workshop" within the meaning of the city ordinance. The two have no necessary connection and do not conflict with each other.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 26, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I acknowledge receipt of your letter of May 20th, asking

for the opinion of this department upon the application of John M. Roach, General Manager for the Receivers of the Chicago Union Traction Company, for permit to put down the "trilby" grooved rail on Lake street, from Canal street to State street, in place of the present rails on said street, which said application states "have become badly worn so that they are not safe to operate . . . cars over."

The first ordinance on Lake street was one passed May 23, 1859, covering that portion of Lake street from Market street to the "present or future limits of the city." (Page 1046, *et seq.* Special Ordinances of 1898.) The grant above referred to was made to the Chicago City Railway Company, and was presumably transferred to the Chicago West Division Railway Company, August 1, 1863.

Several other Lake street ordinances were passed, not material now to be stated. The city claims that the ordinance above referred to, as extended by the ordinance of July 30, 1883, expired on July 30, 1903. The representatives of the traction company, however, claim that said ordinance was extended by the act of 1865 for the period of 99 years from February 14, 1859.

The part of the street now particularly under consideration, to-wit: from Canal to State street, is covered by the ordinance of November 29, 1880, which expressed the term of twenty years. The grant was to the Chicago West Division Railway Company, and the representatives of the Chicago Union Traction Company claim that said ordinance was a mere extension of the ordinance of May 23, 1859, and that the act of 1865 extended not only the ordinances passed prior thereto, but all extensions thereof which might be passed in the future. In other words, that portion of Lake street now sought to be equipped with "trilby" rails in lieu of the worn out rails now in place, is one of the streets upon which a controversy exists between the city and the companies as to whether the rights have expired, or whether they endure for more than fifty years to come.

In view of these circumstances, I am of the opinion you, as a ministerial officer, should not take upon yourself the responsibility of permitting the position of the Chicago Union

Traction Company in this disputed street, to be altered or modified in such a way that its rights are added to or made more valuable. Whether or not the exigencies of public service are of such preponderating importance as to warrant the surrender of tactical advantage for the public convenience is a matter which, in my opinion, should be referred to the City Council.

I have carefully considered the question as to whether or not the restraining order entered in the United States Circuit Court by Judge Grosscup on July 18, 1903, controls your action in this matter, and have come to the conclusion that said injunction merely prevents the city and its representatives from interfering in the operation of the Chicago Union Traction Company's lines in the manner and condition in which they were being operated at the date of said injunctive order. The avowed purpose of the order is to maintain the existing status. The order does not, in my opinion, prevent you from informing the receivers that you are without authority to grant the permit.

Very respectfully yours,

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 26, 1904.

MR. E. M. LAHIFF, City Collector.

Dear Sir:

I have your communication of the 24th inst., requesting the opinion of this department as to the legality of certain revocations from the frontage petition for a saloon license applied for by George Willy.

It appears from the attached papers that before the issuance of a license to this applicant, frontage consents to the amount of 250 feet had been revoked by the owners of the frontage in a written communication sent to the Mayor. The question as to whether a property owner or person signing for frontage to the petition for a saloon license can withdraw his consent before the issuance of the license can no longer be regarded as an open one in this State. In the case of *Joseph*

Theurer v. People, opinion filed April 22, 1904¹, which is the latest expression from our courts upon this subject, Mr. Justice Freeman, of the Appellate Court, for the First District of Illinois, decides that where revocation of consents were filed July 22, 1902, and the license was not issued until July 30, 1902, the revocation is valid, in spite of the fact that permission to open a saloon had been given to the applicant by the Mayor pending his final decision upon the issuance of a license.

The signing of petitions in support of an application for a saloon license is not an irrevocable act, and may be revoked at any time before the jurisdiction of the person or body authorized to act (in this case the issuance of the license by the Mayor) has been determined by it. The names may be generally withdrawn at any time before the tribunal makes its findings or determines the sufficiency of the petition. *Littell v. Board of Supervisors*, 198 Ill. 205; *La Londe v. Board of Supervisors*, 80 Wis. 385; *State v. Eggleston*, 34 Kan. 714; *Dutton v. Hanover*, 42 O. S. 217; *Slingerland v. Norton*, 59 Minn. 357; *State v. Commissioners*, 66 Minn. 534.

I am, therefore, of the opinion that these signers for frontage consents may withdraw their consents at any time before the issuance of a license.

Yours very truly,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MAY 26, 1904.

MILTON J. FOREMAN, Esq., Chairman Committee on Local Transportation, of the City Council.

Dear Sir:

At the regular meeting of the City Council of May 9, 1904, the following order was referred to your committee on motion of Alderman Hunter:

“ORDERED, That the Corporation Counsel be and he is hereby directed to prepare and submit to the Committee on

¹113 Ill. App. 628.

Local Transportation, at its meeting to be held on Saturday, May 14th, a permit to the Union Traction Company to extend its line on Chicago avenue, from Fortieth avenue to Forty-eighth avenue."

Your committee referred the matter to a sub-committee composed of Aldermen Hunter, Blake and Palmer, and Alderman Hunter has requested this department to prepare a form of permit to the Chicago Union Traction Company authorizing the extension of the company's line on said street between said points.

Before drafting a form of permit, I have considered it advisable first to inform your committee of the ordinance rights on Chicago avenue east of Fortieth avenue, of the Chicago Union Traction Company, so that your committee being advised in the premises may consider the policy of issuing the permit and the form of the permit.

October 20, 1879, the City Council by ordinance authorized the Chicago West Division Railway Company to construct, lay down, operate and maintain a single or double track railway, with all necessary turnouts, sidetracks, switches and curves, in, upon and along Chicago avenue, from Milwaukee avenue west to Western avenue, for a period of twenty years from the date of the passage of the ordinance and thereafter, if the company elects, "until the City Council thereafter elect, by order for that purpose, to grant the privilege to some person, persons, party or parties, corporation or company, to purchase said track or tracks of said railway company, cars, carriages, furniture and implements and appurtenances of every kind and description then used by said company in the operation of said railways, and to pay for the same in the manner hereafter mentioned." The price to be paid and how to be fixed is provided by Section 10 of the ordinance, which reads as follows:

"Such order to purchase shall fix the time when said person, persons, party or parties, corporation or company will take such railway and other property herein mentioned, which shall not be less than six months after the passage of said order, and at the time of taking such railway and other property herein mentioned, the said person, persons, party or par-

ties, corporation or company, shall pay to the party or parties operating the same, the sum of money to be ascertained by three commissioners to be appointed for that purpose, as follows: One party chosen by said person or parties from the disinterested freeholders of Cook County, one in like manner by the said company, its associates or successors, operating said road, and the two persons so chosen, one from said freeholders. Said ordinance was accepted June 10, 1889. Vol. 2 of the Code.)

This privilege was extended July 30, 1883, by the extension ordinance of that date for a period of twenty years, and expired July 30, 1903.

It appears that the company did not construct said road so far west as Western avenue, but only to Leavitt street.

May 13, 1889, the City Council by ordinance authorized the West Chicago Street Railway Company, its successors and assigns, to extend the street railroad leased of said company on West Chicago avenue, from the "present terminus" (at Leavitt street) to California avenue. No duration of the privilege was specified, and the right to operate is terminable by the city at will. Said ordinance was accepted June 10, 1889, (See page 1607, et seq., id.)

March 21, 1892, the City Council by ordinance authorized the West Chicago Street Railroad Company, its successors and assigns, to lay down, maintain and operate a single or double track street railroad, with all necessary and convenient turnouts, sidetracks and switches, in and along certain streets in the City of Chicago therein mentioned, among said streets being Chicago avenue, from California avenue to Grand avenue, for a period of twenty years from and after the passage of the ordinance, which ordinance was accepted March 28, 1892. (See pages 1636, et seq., id.) This right, therefore, terminates March 20, 1912.

May 6, 1895, the City Council, by ordinance, authorized the West Chicago Street Railway Company, its successors, assigns and lessees, to lay down, maintain and operate a double track street railway with the necessary sidetracks, turnouts and switches, upon Chicago avenue, between Grand avenue and Kedzie avenue, for a period of twenty years from the

date of the passage thereof, which ordinance was accepted May 27, 1895. (See page 1655, et seq., id.) This privilege expires May 5, 1915.

It further appears that the Chicago Union Traction Company is operating cars on Chicago avenue west from Kedzie avenue to 40th avenue (formerly Crawford avenue). I have been unable to find any grant for the construction and operation of this portion of the road, nor was such grant found by the so-called Harlan Committee. If there was no grant the privilege is one terminable by the city at will.

This brings us to the consideration of the proposition under discussion, to-wit: authorizing the company to extend its lines on said street from 40th avenue westward to 48th avenue. It is contended by Alderman Hunter that the residents adjacent to said street between said points are in need of better transportation facilities, and that the receivers of the traction company are willing to extend the tracks on said street as far west as 48th avenue in order to better the transportation facilities. The question is presented as to whether the permit shall be given to the receivers of the Chicago Union Traction Company as the successor of the West Chicago Street Railway Company, revocable at any time hereafter by the Mayor, or for a fixed term, with appropriate provisions authorizing purchase by the city at any time hereafter with such further provisions for compensation to the city and for such municipal regulation as are appropriate to a term grant in the circumstances; or whether, on the other hand, the entire matter of the extension of the tracks and the giving of additional rights and privileges, even for a period terminable at will by the city are to be postponed until the matters in controversy between the city and the Chicago Union Traction Company reach a settlement either through litigation or by negotiations.

Permit me here to call your attention to the difference existing between the case now under consideration and that of the proposed permit for a double track in South Fortieth avenue.

First. There a showing has been made by the Alderman who introduced the original order in the council that a pub-

lie necessity exists for the proposed change of a single track to a double track, and that the passage of the order may therefore be considered not as the granting of a privilege but as the exercise of the city's police power. Your committee will undoubtedly be able to determine whether or not any such state of affairs exists in regard to the extension of the Union Traction lines on Chicago avenue, from Fortieth avenue to Forty-eighth avenue.

Second. The grant under consideration on South Fortieth avenue was not made to the Chicago West Division Railway Company, or any corporation claiming under it, but to an independent and then competing company—the Ogden Street Railway Company, organized under the General Corporation Act, subject to the limitations of the Horse and Dummy Act and of the Cities and Villages Act; so that no question of the ninety-nine year act so-called can arise with regard thereto. Here, on the other hand, the original ordinance on Chicago avenue was made to the Chicago West Division Railway Company, and it is now claimed by counsel in the traction case that said company acquired on Chicago avenue franchise rights from the State which are to endure for ninety-nine years, and which apply not only to the original grant but to all “extensions, continuations and feeders” of said original line.

I am not to be understood as lending any countenance to this preposterous claim. It is I believe as untenable in law as it is intolerable in morals; but so long as this claim is made by the representatives of the Chicago Union Traction Company, your committee may well consider whether or not you will refuse to add anything to claims which are of such extraordinarily expansive character.

Very respectfully submitted,

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 27, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your letter of the 24th inst., in which you inquire whether you have the legal right to issue a license for

Sunday baseball in the face of a protest of interested citizens in a case where you have received both protests against the granting of the license and petitions in favor of granting the same, I beg leave to say:

Section 99 of the revised code of 1897 classify amusements and all public exhibitions for gain into five classes, for the purpose of licensing and taxing the same. Baseball comes under classification four of said section.

Section 100 makes it unlawful to give the entertainments enumerated in Section 99 without a license and provides a penalty for the breach thereof.

Section 101 fixes the amount of the license, which for ball games is \$10 for each day.

Section 102 reads as follows:

"And every license shall be issued by the City Clerk on notice to him from the City Collector that the license tax or fee has been paid, and shall be signed by the Mayor."

Section 108 provides that the licenses shall be subject to all ordinances of the city existing or thereafter to be passed so far as the same shall apply.

Section 109 provides, among other things, that the Mayor may revoke the license of any person who has violated the provisions of the license.

These ordinances find their support in the following clauses of Article V of the Cities and Villages Act.

"Section 1. The City Council in cities and President of the Board of Trustees in villages shall have the following powers:

"Forty-first. To license, tax, regulate, suppress and prohibit . . . theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure."

"Fifty-eight. To regulate places of amusement."

It seems from these statutes and ordinances that the intention of the legislature was to give municipalities exclusive jurisdiction over the matter of the regulation of amusements, and from the ordinances it is clearly apparent that the City Council has delegated to the Mayor the duty of ascertaining to what class the amusement belongs, and has imposed upon him the duty of issuing the license upon the compliance by

any person with the provisions of the amusement ordinance, unless some legal obstacle prevents. There is no municipal legislation against Sunday baseball games or other similar amusements. The only legislation which I find having any relation to the matter under consideration is contained in Sections 261 and 262 of the Criminal Code, which are as follows:

"Section 261. Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by any amusement or diversion on Sunday, shall be fined not exceeding twenty-five dollars. . . .

"Section 262. Whoever shall be guilty of any noise, rout or amusement on the first day of the week, called Sunday, whereby the peace of any private family may be disturbed, shall be fined not exceeding twenty-five dollars."

It has been decided that in order to constitute an offense under Section 261, it must be proved beyond a reasonable doubt that the act in question is a disturbance of the peace and good order of society. (*Johnson v. The People*, 42 Ill. App. 594.) I have no doubt that under a parity of reasoning the same case would be applied to the similar language used in Section 262, above quoted.

Mr. Justice Boggs (now a distinguished member of the Supreme Court of Illinois), in the case above cited, said:

"Labor on Sunday is not of itself punishable under the statute, nor can it be said that the statute prohibits labor on Sunday. The offense that is punishable is the disturbance of the peace and good order of society."

In like manner it must also be said that amusement on Sunday is not of itself punishable under this statute, nor can it be said that the statute prohibits amusement on Sunday. The gist of the statutory offense in either case is the disturbance of the peace.

I am of the opinion that the petitions which you have received in favor of the granting of said license and the protests against the granting thereof are both immaterial to the question in hand. Neither petitions nor protests are provided for or authorized by any ordinance or statute in a case like this. It is your duty to issue an amusement license under

the ordinance where a person brings himself within the provisions thereof, unless legal grounds exist against the issuing of such license. If the evidence shows that the persons making the application for this license are of bad character, dissolute or disorderly in their conduct, and that the amusement in question has been so carried on in the past by these persons as to be clearly a disturbance of the peace and good order of society or of the peace of any private family, you would be authorized in your discretion to refuse the license; but if the applicants are of good moral character, and the evidence does not establish that the amusement in question, within the reasonable acceptance of the words, is a "disturbance of the peace and good order of society" or a "disturbance of the peace of any private family" you have, in my opinion, no authority to refuse the permit. The mere fact that some person or persons complain that the playing of baseball on Sunday disturbs their peace is not sufficient in itself to bring the act complained of within the statutes above quoted. You must be satisfied from the evidence that the amusement in question does disturb the peace, within the natural and reasonable meaning of those words, and not within any forced or unreasonable construction of such language.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

MAY 31, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have a communication from you of the 23d inst., requesting the opinion of this department as to whether or not the city can compel the Illinois Central Railroad Company to keep its subways in Fifty-first street clean and in repair.

The duty of railroad companies to maintain crossings in cities under the statute are found in the following section: Paragraph 6, Section 20, Chapter 114, Starr & Curtis' Statutes, gives the right to a railroad company:

"To construct its railway across . . . any street, highway . . . turnpike or canal which the . . .

railway shall intersect or touch, but such corporation shall restore . . . street, highway and turnpike thus intersected to its former state, or to such state as not necessarily to have impaired its usefulness and keep such crossings in repair' . . .”

Section 77, Chapter 114, Starr & Curtis' Statutes, provides:

“Hereafter, at all of the railroad crossings of highways and streets in this State, the several railroad corporations in this State shall construct and maintain said crossings and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property.”

At common law, whenever any person or corporation for his or its own gain, advantage, convenience or necessity, interfered with, cut into or across the highway, it devolved upon that person or corporation to restore the highway at his or its own expense to as good condition as before, and, whenever any cut across the highway was made that required a bridge, it became obligatory upon anyone making such cut, not only to construct such bridge, but thereafter to maintain it in repair so that travelers and traffic would not be unnecessarily obstructed or inconvenienced. *Dygert v. Schenck*, 23 Wend. 446. The obligation was regarded as a continuing one. Any failure in this respect rendered the offender liable, not only in civil proceedings, but criminal as well.

It is thus plain, that it was the duty of this company to maintain its crossings upon common law principles as well as under the statutes.

In regard to crossings, even to the extent of compulsory construction of viaducts or subways, where the safety of lives and property may require it, I find no authority for any abatement of the common law doctrine in favor of the railways. It is said in *People v. C. & A. Railroad Co.*, 67 Ill. 118:

“It is a well settled principle of the common law resting upon the most obvious considerations of justice, that any person or corporation that cuts through a highway for the benefit of such person or corporation must furnish to the public a proper crossing.”

In *Cook v. Boston, etc., Railroad Company*, 133 Mass. 185, it is held that a railroad must see that its crossing does not become inadequate to meet the needs of an increasing population.

The construction or maintenance of a railroad over public highways by reason of increased and growing traffic and travel, both on the highway and on the railroad, may, not only from public convenience, but from public necessity require the construction of viaducts or (in case of track elevation) subways. The action of the railroad company in constructing and maintaining for its gain and advantage a railway over the public highway has as a natural result required the viaduct or subway and occasioned the keeping it repaired. To cast upon the public the burden of maintaining such a subway, which was occasioned by the railroad's increased business, would be manifestly unjust, since, were the railroad tracks not there, there would be no subways and no need of repairs. The duty of the company to keep its subways in such condition as to give the public free and safe access across its tracks is not limited to merely the street immediately under its right of way, but has been held to include the necessary approaches thereto. In *McFarlane v. City*, 185 Ill. 242, lateral approaches, parallel to the railroad right of way and at right angles and leading up to a main approach to a viaduct, were held to be necessary approaches to the viaduct.

This department has uniformly held the law to be as I have above stated, in numerous instances.

I notice in the attached communication from the Second Vice President of the railroad company that he repudiates any obligation to *pave* Fifty-first street at the subway crossing, while in your letter you mention merely the *keeping the subway clean* and *in repair*. While the question of paving is not directly brought to my attention by your letter, I will say that the same reasons which render it the duty of the company to clean and repair their subways also make it obliga-

tory for them to pave the street under the subway and the approaches thereto.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JUNE 1, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have a communication from the Citizen's League of Chicago, referred by you to this department, for an opinion as to whether under Section 1173 of the Revised Code, providing for transfer of licenses, a saloon license can be legally transferred. Section 1168 of the Revised Code of 1897, provides:

"1168. Assignment prohibited—exception. No license granted under this ordinance shall be assignable or transferable without permission of the Mayor, nor shall any such license authorize any person to do business or act under it but the person named therein, except as is in this ordinance otherwise provided."

Section 1173, the validity of which is now brought into question, provides:

"1173. Transfer of license. Any person or persons to whom any license may have been issued under any ordinance of the City Council, may with the permission of the Mayor assign and transfer the same to any other person or persons, and the person or persons to whom such license is issued or the assignee or assignees of such license, may with the permission of the Mayor surrender such license, and have a new license issued for the unexpired term of the old license, authorizing the person or persons so surrendering such license to carry on the same business or occupation at such place as may be named in such new license: Provided, that in all cases the party applying for such new license shall give bond with sure-

ties which shall conform as near as may be to the bond upon which such surrendered license was issued."

The Dram Shop Act, Hurd's Revised Statutes, 1901, page 751, by Section 1, provides:

"How License May Be Granted. Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That hereafter it shall not be lawful for the corporate authorities of any city, town or village in this State, to grant a license for the keeping of a dram shop, except upon the payment, in advance, into the treasury of the city, town or village granting the license, such sum as may be determined by the respective authorities of such city, town or village, not less than at the rate of five hundred dollars (\$500) per annum: Provided, that in all cases where a license for the sale of malt liquors only is granted, the city, town or village granting such license, may grant the same on the payment, in advance, of the sum of not less than at the rate of one hundred and fifty dollars (\$150) per annum: *And, provided further*, that the City Councils in cities, the Board of Trustees in towns, and President of Board of Trustees in villages, may grant permits to pharmacists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, under such restrictions and regulations as may be provided by ordinance."

Section 4 of the same act provides:

"Form of License—Rights Under—May be Revoked. Section 4. The license shall state the time for which it is granted, which shall not exceed one year, the place where the dram shop is to be kept, and shall not be transferable, nor shall the person licensed keep a dram shop at more than one place at the same time, and any license granted may be revoked by the County Board whenever they shall be satisfied that the person licensed has violated any of the provisions of this act, or keeps a disorderly or ill-governed house or place of resort for idle or dissolute persons, or allows any illegal gaming in his dramshop, or any house or place adjacent thereto."

Even if this latter section, as has been contended, has application to licenses granted by County Boards and does not apply to licenses granted by cities and villages incorpor-

ated under the general Cities and Villages Act, yet its provisions show a general intention of the legislature to prohibit the assignment of saloon licenses.

The principle of law that saloon licenses are not assignable is abundantly sustained by the authorities on the ground that the license is a personal trust imposed on the licensee and not in the nature of property. Public policy also forbids the transfer because it is important to the public not only that the number of liquor dealers be limited, but that permission to sell be restricted to reputable and presumably trustworthy persons. (*Munsell v. Temple*, 3 Gil. 93; *In re Blumenthal*, 125 Pa. St. 412, 18 Atl. Rep. 395; *State v. County Commrs.*, 22 Fla. 1; *Heath v. State*, 105 Ind. 342, 4 N. E. Rep. 901; *Godfrey v. State*, 5 Blackf. 151; *Lewis v. United States*, 1 Morris, 264; *Alger v. Wesion*, 14 Johns 231; *Semple v. Flynn* (N. J. Ch.), 10 Atl. Rep. 177; *State v. McNeeley*, 1 Winst. Eq. 334; *Comm. v. Bryan*, 9 Dana, 310; *State v. Lydick*, 11 Nebr. 366, 9 N. W. Rep. 560; *In re Templeton*, 4 Lancast. Law Rev. 242.

In the case of *Munsell v. Temple*, *supra*, it appears that the Revised Statutes of 1845 provided:

"County Commissioners may grant licenses to keep groceries upon the following conditions, to-wit: First, the applicant shall pay into the county treasury for the privilege granted a sum not exceeding three hundred dollars nor less than twenty-five dollars in the discretion of the court. Second, the applicant shall execute a bond in the penalty of five hundred dollars with one or more securities to be approved by the court conditioned that the applicant shall keep an orderly house," etc.

The court say with reference to these conditions:

"The policy of our legislature has always been to restrain the selling of spirituous liquors by retail. The section referred to is conceived in this spirit and prohibits, in language not to be misunderstood, the County Commissioners from issuing a license unless the conditions prescribed by law had been previously complied with.

"In requiring less than twenty-five dollars the County Commissioners must have acted upon the idea that licenses are

transferable and that they might be granted for the residue of a term. But this is a mistake. Licenses attach to the person and cannot be used by others, even with the consent of the court, for what remains of the annual term for which they have been originally given."

In the present case the statute makes it unlawful for the corporate authorities of any city to grant a license for the keeping of a dram shop except upon the payment in advance into the treasury of the city of such sum as the authorities may have prescribed not less than at the rate of five hundred dollars per annum. Section 5 of the act also provides:

"Bond—How Taken—Suit on. Section 5. No person shall be licensed to keep a dram shop, or to sell intoxicating liquors, by any County Board, or the authorities of any city, town or village, unless he shall first give bond in the penal sum of \$3,000, payable to the people of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person or property, or means of support, by reason of the person so obtaining a license selling or giving away intoxicating liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away of any intoxicating liquor by the person so licensed, or by his agent or servant."

The statute being penal in its nature, its provisions must be strictly construed. Authority is given under Section 1173 to issue a new license, although really amounting to nothing but a transfer of the old license, upon the condition that the new licensee shall give a bond with sureties which shall conform, as near as may be, to the bond upon which such surrendered license was issued. The new licensee could therefore, under the provisions of Section 1173, obtain a new

license for the unexpired term of the old license without paying any additional license fee to the city, and only being required to furnish a bond with sureties "which shall conform as near as may be to the bond upon which such surrendered license was issued." This section of the ordinance is in contravention of the terms of the statute in two particulars: *First*, in that it waives a new license fee; and *Second*, that it does not require the exact and specific bond mentioned in Section 5 of the act. The words used in Section 1173 regarding the bond "as near as may be" might mean almost anything, and the determination of how nearly the requirements of the new bond conform to the old would rest within the discretion of the officer issuing the license, who might require the statutory bond and might not.

A case similar to the one in question arose in Nebraska (*State v. Lydick*, 11 Neb. 366), where a licensee transferred his license to keep a saloon, and the transferee obtained an order under the authority of the Mayor and City Council directing the license to be transferred to the transferee. The court, in passing upon the question of whether the transferee under the assigned license was protected from a prosecution, say upon page 371:

"An examination of the above provisions of law, can scarcely fail to satisfy any one that the people of this State have reserved to themselves, acting through the several local boards, county and city, the right to discriminate between the different applicants for liquor licenses, to license such applicants as upon the principles laid down should be deemed worthy, and refuse those who, upon the application of the same principles, should be held to be unworthy. A licensee, under the above provisions, accepts from the authorities a personal trust and assumes personal duties and responsibilities quite repugnant to the idea of his selling his license along with his stock on hand, furniture and fixtures. Under statutes much less discriminating than ours, it has been held by the courts of Kentucky, Indiana, Delaware, Alabama, Louisiana, Pennsylvania, New York and other States, that a liquor license is a personal trust or permit, and is incapable of assignment."

(*State v. Lydick*, 11 Nebr. 366.)

It has been suggested that under the powers conferred by the legislature upon the City of Chicago under its new charter, adopted 1875, that the City Council was empowered, by Article 5, Section 62 of the Cities and Villages Act, in Clause 4, "to fix the amount, terms and manner of issuing and revoking a license," and in Clause 46, "to license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license," and in Clause 48, "to forbid and punish the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor to any minor, apprentice, servant, or insane, idiotic or distracted person, habitual drunkard or person intoxicated." This act was passed April 10, 1872, while the Dramshop Act was passed March 30, 1874.

While it is true that by the Cities and Villages Act the regulation and manner of issuing licenses to saloons is granted to the City Council, I think that the authority thereby granted would not have the force of permitting the licensing officer of a city to disregard the plain provisions of the Dram Shop Act, whether these latter provisions are inconsistent with the former or not. It has been said that the principle of contemporary and practical construction generally applied to ordinances, statutes and constitutions is of weight in the present case, it being admitted that transfers such as those in question have been made for nearly thirty years. While this doctrine is of great force in the construction of statutory and ordinance provisions relating to contracts, to have the force of law in regard to the construction placed upon a law by public officials I think it must first be shown that a certain construction has been placed upon the ordinance or statute by all or a majority of public officials who act under the law, and I cannot assume here that what has been the custom in Chicago for the last thirty years has been the uniform practice of licensing officials throughout the State.

In conclusion, I am of the opinion that Section 1173 of the Revised Code conflicts with and is in contravention of

the plain provisions of the State law regarding the issuance of licenses, and in so far as it applies to the transfer of saloon licenses and the issuance of new licenses in lieu thereof, to persons not complying with the provisions of the Dram Shop Act, it is invalid, and that saloon licenses in this city cannot be legally transferred.

This opinion is not to be understood as holding that the owner of a saloon license may not surrender it, and that a new license may not be issued by the Mayor to any fit and proper person who complies with all the provisions of the statutes and ordinances. This he may do, not because of the assignment of a license, but because of a new application placing the new applicant in all respects on the same level as any other applicant; his application may then be granted or denied, as in any other case. If as stated in the letter of M. M. Parkhurst an assignment of the license is made in bad faith, to escape the punishment which the law imposes on misconduct, the Mayor might properly refuse to issue a license to any person applying merely as the figure head or stool pigeon of one whose privilege had been or should be forfeited for misconduct.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JUNE 1, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

There has been referred to this department by you for legal opinion the matter of certain alleged violations of the ordinance passed March 14, 1904, amending Section 1185 of the Revised Code of 1897. I have thoroughly examined the attached papers including the evidence taken before Justice Prindiville and find the facts, concerning which there is little or no dispute, to be as follows:

First. The Sherman House Hotel Company controls and

operates as a portion of its caravansary a restaurant known as the College Inn, situated in the basement of the Sherman House Hotel and having an entrance upon the street directly from the sidewalk and another through the hotel itself.

Second. There is a small service bar connected with the restaurant, and adjoining the same, over which no drinks are sold publicly but which is used as a service place for dispensing drinks to the patrons of the restaurant and is supplied from the main bar of the hotel, whose entrance is on Randolph street.

Third. About the 7th of April, 1904, and on several occasions prior thereto, drinks were consumed in the College Inn after one o'clock in the morning, although the actual sale of these drinks to the customers occurred before one o'clock a. m.

Fourth. The bars of the hotel (both the Randolph street bar and the small service bar in the restaurant) appear to have been closed promptly at one o'clock.

The question of law now to be determined is, whether, by allowing drinks to be consumed in its restaurant after one o'clock a. m. the hotel company has been guilty of a violation of the ordinance in question, although no liquor was actually sold or served after one o'clock a. m.

Section 1185 of the Revised Code of 1897 provides:

"No person shall keep open any saloon, bar-room or tippling house during the night time between the hours of twelve o'clock midnight and five o'clock a. m., under a penalty of not less than \$20 nor more than \$100 for each offense.

The amendatory ordinance of March 14th, 1904, changes the provisions of the above section by enlarging the time during which a saloon, bar-room or tippling house may be kept open by making the closed period from one o'clock a. m. to five o'clock a. m.

The offense, if any, committed by the proprietors of the hotel was a violation of the prohibition contained in the ordinance, not against selling liquor after one o'clock a. m., but against keeping open after that hour. The selling of liquor is not an element of the offense of keeping open after a prohibited time. A. & E. Enc. of Law, Vol. 17, 2d. Ed., page 348;

Hall v. State, 3 Ga., 18; *Lucas v. State*, 92 Ga., 454; *Purefoy v. People*, 65 Ill. App., 169; *Koop v. People*, 47 Ill., 327; *People v. Cox*, 70 Mich., 247; *People v. Cummerford*, 58 Mich., 328; *People v. Bowkus*, 109 Mich., 360; *Lederer v. State*, 11 Ohio Dec. (reprint), 31; *People v. Schotthey*, 116 Mich., 1.

In defining a tippling house our Supreme Court say, in the case of *Koop v. People*, 47 Ill., 327:

“A tippling house is defined to be a public drinking house.”

Other authorities have defined a tippling house to be

• “A place of public resort, where spirituous, fermented and other intoxicating liquors are sold and drank in small quantities.”

The policy of the courts in this State, whether correct or not, has been to regard the liquor traffic as criminal except in so far as expressly authorized and made lawful by license. *The People v. Law and Order Club*, 203 Ill., 127. This attitude of our Supreme Court toward the business of selling intoxicating liquor is shown in *People ex rel. v. Cregier*, 138 Ill., 401, wherein, on page 418, the Court say:

“The tendency of the liquor traffic is so completely shown by all human experience, that from an early day said traffic has been subjected in this State to the surveillance and control of the police power, and we presume such has been the case in most if not all civilized communities.”

The above cases show the tendency to the utmost strictness in the construction of dram shop acts and ordinances restricting the sale of intoxicants. Not only in this State have the courts exacted the strictest compliance with saloon license laws, but throughout the various jurisdictions it has been uniformly held that there must be compliance with not only the spirit but the letter of the law.

In *Monsees v. State*, 78 Ga., 110, it is held that the keeping of a tippling house open for a moment is a violation of the law requiring the closing of such places on Sunday, and that there is no purpose for which the statute (compelling Sunday closing) authorizes such a house to be kept open.

In *People v. Waldvogel*, 49 Mich., 337, it was held to be an offense against the Sunday closing law to keep a saloon open

Sunday for the purpose of cleaning and scrubbing it out, and in *People v. Higgins*, 56 Mich., 159, the Court say :

“A dram shop cannot be kept open for any purpose on Sunday where the Sunday closing act is in force.”

Nor will the fact that the College Inn is a restaurant of perfect respectability relieve its proprietors from the burden of strict compliance with the ordinance, as the business of the restaurant, by reason of the selling of intoxicating liquors to the patrons thereof, is impressed with the character of a saloon. It has been repeatedly held that a restaurant where drinks can be and are occasionally sold, though from a separate apartment, is within the prohibition of keeping a tippling house open during prohibited times. *Harmon v. State*, 92 Ga., 455; *Cooper v. State*, 88 Ga., 441.

In *Hussey v. State*, 69 Ga., 54, it is said :

“It makes no difference in law whether the place be called a bar-room, or glee club resort, or a parlor, or a restaurant, if it be a place where liquor is retailed and tippled on the Sabbath day, and if the door to get into it is so kept that anybody can push it open and go in and drink, the proprietor of it is guilty of keeping open a tippling house.”

A case precisely similar to the one under discussion has arisen in this county: *Baldwin v. City of Chicago*, 68 Ill., 418. This was a case wherein the facts stipulated were that Baldwin was a restaurant and saloonkeeper in Chicago and that his main business was providing meals for boarders and transient persons, and that he sold liquors and was licensed so to do; that he kept open his place of business after the hour of twelve o'clock midnight for serving meals only; that he did not sell liquor after midnight, but that he did serve meals, and that before the hour of twelve he closed his bar by means of drawing a curtain around it, thus shutting it out of view, and did not open it until after five o'clock in the morning. The charge against him was violation of the ordinance known as the ordinance requiring the closing of saloons at twelve o'clock midnight until five o'clock in the morning. A criminal prosecution was commenced before a police justice, and a judgment rendered in favor of Baldwin, from which the city appealed to the Criminal Court. Upon a reversal of the justice's

finding in the Criminal Court before Judge Gary, appellant Baldwin appealed to the Supreme Court. The Court say, on page 420:

"No objection is urged, and none is apparent, to the reasonableness of the ordinance under which appellant was convicted. It is contended, however, that the facts admitted in the stipulation do not constitute a violation of the ordinance; that liquor selling is but an incident to the business of appellant, and that if this conviction shall be sustained, it must follow that hotels, drug stores, and every business carried on in the city, in which liquor selling is an incident to, but not the main business, will fall within the restrictions of the ordinance. We do not perceive that this result must necessarily follow. That it may follow in some cases is probable, but when it does it must be because those who own or control hotels, drug stores, etc., shall choose to conduct their entire business in their saloons, bar-rooms or tippling houses. When however, they shall keep their saloons, bar-rooms or tippling houses in one room, and conduct their other business in separate rooms, we think the closing of this branch of business at midnight can be effectually done without interfering in the slightest degree with their other business. . . . The object of the ordinance is manifestly not merely to stop drinking at that hour, but also to compel those who are inclined to collect and tarry at such places to then depart.

"Such ordinances are for the promotion of the quiet and good order of the city, and it is important that they should be so construed and enforced as to accomplish, as far as may be reasonably practicable, the end had in view in their adoption. We perceive no cause for disturbing the judgment below, and it is therefore affirmed."

In view of the unmistakable language used by our Supreme Court in the above decision, I cannot but be of the opinion that a full compliance with the provisions of the one o'clock closing ordinance means that all places wherein intoxicating liquors are publicly sold must be closed to the public at one o'clock a. m., and I am consequently of the opinion that the Sherman House Hotel Company has been guilty in the acts before mentioned of a violation of this ordinance.

This department has heretofore held that entertainments and public gatherings in a theater or public hall, where liquor is sold directly or indirectly, is a dram shop under the statute, but not a tippling house under the midnight closing ordinance. This opinion is not meant to apply to gatherings of that sort, such as balls, banquets, wedding parties or other social gatherings, even where liquor is dispensed. Such places, although coming within the statutory definition of dram shops, are not saloons or tippling houses.

Very respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JUNE 2, 1904.

MR. JOHN BUCKLEY, Harrison Street Police Station, Chicago:

Dear Sir:

I have your communication of recent date requesting the opinion of this department as to your status as a beneficiary in the Police Pension Fund in the event of the passage of an ordinance introduced May 3d, 1904, creating the position of Bertillion operator in the police department, and in the further event of your being able to obtain the appointment on a promotional examination.

While it is not customary for this department to render what may be termed speculative opinions upon abstract questions of law or matters affected by future contingencies, I will say, after a consultation with the President of the Police Pension Board and an examination of the statutes involved in the determination of the question you ask, that I am of the opinion that an acceptance on your part of the position proposed to be created by the ordinance in question would deprive you of further benefits to be derived from the Police Pension Fund.

The Pension law, in my opinion, clearly contemplates that only those persons shall be pensioned who are police officers in the full sense of the term, and who are exposed to the dangers surrounding a police officer in active service, and sub-

ject to the hazardous environment of such a life, and does not embrace the duties of such a *quasi* clerical nature as those of a Bertillion operator in the Bureau of Identification.

This department has heretofore held that patrol wagon drivers, the hazardous nature of whose duties are admittedly greater than those of the position to be created by the ordinance, are not police officers who are entitled to participation in the Pension Fund.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,
Acting Corporation Counsel.

JUNE 3, 1904.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

I have your letter of May 31st, stating that it is the general impression that every part of every theater building will have to be made fireproof on or before the first of September, but that in Sections 30 and 37 of the ordinance governing the construction of buildings of Classes IV. and V., passed by the City Council January 18th, 1904, and amended January 25th, 1904, it says in effect that theaters may be repaired or reconstructed with the same materials as were used in the construction of the building, and you request our opinion in regard to said sections in particular, and the subject in general. Section 30 is as follows:

“All buildings of Class V. *hereafter erected* shall be built entirely of fireproof construction.

All alterations in existing buildings of Class V. intended to make them comply with the requirements of this ordinance may be executed in the same materials of construction at present employed in such buildings, unless otherwise distinctly provided by this ordinance.” (See page 2063 Council proceedings, 1903-4.)

Examination of the ordinance in question will readily demonstrate to the reader that the ordinance is clearly and

distinctly framed so as to regulate both "existing" and "hereafter constructed" buildings. To learn what provisions of the ordinance apply to existing buildings you must harmonize the specific section controlling a specific portion of the building or its equipment as a theater with said Section 30. If the provision in question does not distinctly provide that the alterations in existing buildings of Class V. intended to make them comply with the requirements of this ordinance shall be executed in some other material (undoubtedly fireproof material), the alterations may be executed in the same materials of construction employed in such building at the time of the passage of said ordinance, to-wit: January 18th, 1904.

You refer to Section 37 of the ordinance (see page 2066 Council proceedings, 1903-4). This section applies to theaters now existing, as well as those hereafter constructed, and its provisions are mandatory and state the materials of which the stage shall be constructed. In regard to the portions of the stage and its equipment specified in Section 37 there can be no doubt that any changes made in an existing theater to comply with the provisions of this ordinance must be made in the materials designated in said Section 37, rather than of the same material as in use at the time of the passage of the ordinance. If, however, the ordinance is silent as to a specific improvement, for instance: a vent over the stage, and the ordinance does not specifically provide that the vent shall be of iron or steel, then, in order to comply with the requirements of the ordinance that there be a vent of a certain size over the stage it may be made of the same material used in the specific building at the time of the passage of the ordinance, to-wit: January 18th, 1904.

Very truly yours,

WM. H. SEXTON,
Acting Corporation Counsel.

JUNE 3, 1904.

TO THE HONORABLE, THE COMMITTEE ON FINANCE OF THE
CITY COUNCIL.

Gentlemen:

This department has been requested to render an opinion

as to the liability of the city for the claims of John S. Kelly, J. E. Brudenell, E. S. Schirrman, W. H. Dwyer and W. R. Denning, each of whom has presented a claim to the City Council for salary during suspension from duties.

The facts in these cases as related to me by the Secretary of the Department of Health are as follows:

These men, who were plumbing inspectors employed in the Health Department, were indicted by the grand jury of Cook County on or about August 1st, 1903, on charges of having accepted bribes; thereupon, on or about August 3d, 1903, they were each suspended from duty by the Commissioner of Health for a period of thirty days. At the end of the said period of thirty days the Commissioner sought to impose a further suspension, but was informed by the Civil Service Commission that under the rules it could not be done, and that he would have to either reinstate the men or file charges against them. The men, not wishing to have charges filed against them, and the Commissioner at the same time deeming it improper to allow them to continue to discharge the duties of their positions pending their trials under said indictments, the men applied for and obtained a leave of absence for six months or less. Before the expiration of six months, and shortly after the beginning of said leave of absence, the Commissioner found that it was absolutely necessary to have other men to do the work which had theretofore been performed by the five inspectors in question, and upon application to the Civil Service Commission five other men were certified from the list of eligibles to take their places, and these five men so certified, with one exception, are still employed in the department. Subsequently, and on or about March 3d, 4th and 5th the claimants applied for and were granted a further leave of absence of sixty to ninety days. Since then they have all been tried on the indictments in question and have all been acquitted. Mr. Schirrman was again certified to the head of the department on or about May 1st, 1904, and Messrs Brudenell and Denning are now employed in the Water Bureau.

Section 4 of the Civil Service Act clothes the Civil Service Commission with the power "to make rules to carry out

the purposes of this act, and for examinations, appointments and removals in accordance with its provisions. . . .”

Section 12 specifies the method of procedure for the making of removals by the Commission and provides among other things “that nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period not to exceed thirty days.”

In the exercise of the power conferred by Section 4 of the act, the Civil Service Commission has formulated and adopted rules to carry out the purposes of the act, among which are the following:

“Rule VIII., Section 1. REMOVALS, HOW MADE. Charges under Section twelve (12) of the act, against any person holding an office or place of employment in the classified service of the city, may be filed by the appointing officer or head of the department in which the person against whom such charges are made is employed. Such charges shall be investigated by or before the Commission or by or before some officer or board appointed by the Commission to conduct such investigation. . . .

“Notice and opportunity to be heard shall be given the accused in such cases as is required in cases of charges filed by the appointing officer or head of a department. Pending such investigations the appointing officer or head of a department may suspend the accused for a reasonable period not exceeding thirty (30) days.”

Rule XIV., Section 4. LEAVE OF ABSENCE. Leave of absence may be granted by the head of a department for a period not exceeding one year by making a report in writing within five days of such grant to this Commission. The person absent on leave may be reinstated to his former position at the expiration of his leave, but if such absence on leave exceeds thirty days and in the case of sickness ninety days, and his position in the meantime has been filled, then he can only be reinstated when a bona fide vacancy exists, and not then until all persons with older seniority on the register have been reinstated first. Failure to report at the expiration of a leave of absence shall drop the eligible from the register.

“Certification may be made to fill these temporary periods

from the proper lists, and the fact that the employment is for the purpose of filling a temporary vacancy shall be stated on the certification."

Taking the facts then as hereinbefore recited, and considering them in the light of the sections of the Civil Service Act and of the rules of the Civil Service Commission above quoted, we have this situation :

For a period of thirty days subsequent to August 3d, 1903, the claimants were under suspension from duty ordered by their superior officer, who is clothed by the Civil Service Act with express power and authority to suspend them. For the said period of thirty days the claimants would certainly not be entitled to pay. From the expiration of the said period of thirty days almost down to the present time the claimants have been absent from their duties on leave of absence granted at their request. During the first leave of absence granted to them other men were certified to take their places, and under Section 4 of Rule XIV. above quoted this has the effect of placing the claimants at the foot of the eligible list, and they are not entitled to be reinstated until their names are again reached on said eligible list. I think it quite plain that they have no valid claim against the city for salary during this period.

For the reasons above stated, I am of the opinion that the city is not liable for the claims in question, and would respectfully recommend that they be placed on file.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

JUNE 8, 1904.

MR. D. M. HYLAND, Acting City Electrician.

Dear Sir:

Replying to your inquiry of March 16th as to whether or not the City of Chicago has authority under Sections 596, 597, 598 of the Revised Code to require the inspection of elec-

trical wires and devices in buildings owned and used by the Federal Government, and in buildings owned and used by the County of Cook, I beg leave to advise you that as to buildings owned and used by the Federal Government in the performance of its governmental functions, the city has no authority to compel a compliance with the above ordinances.

The Legislature of this State passed "An Act ceding to the United States exclusive jurisdiction over certain lands acquired for public purposes within this State, and authorizing the acquisition thereof. (Approved and in force April 11, 1899.)" S. & C., Chap. 143, Sections 24 et seq. Sections 1 and 2 of said act are:

"Section 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS REPRESENTED IN THE GENERAL ASSEMBLY: That the consent of the State of Illinois is hereby given, in accordance with the sixteenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this State required for custom houses, court houses, post offices, arsenals, or other public buildings whatever, or for any other purpose of the Government.

"Section 2. That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States, for all purposes except the administration of the criminal laws and the service of all civil processes of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands."

In the case of *Egan v. City of Chicago*, 5th Ill. App. 74; the City Council, by resolution, directed certain architects to make an examination of the foundations of the post office, and to report thereon as to their safety. In passing upon the power of the council in the premises, the court said:

"And it would doubtless follow that if the resolution of the City Council and the appointment by the Mayor of the commission of architects was but a preliminary step towards an actual interference with the work on the building or its foundations, and if no other purpose was intended or could be subserved by their action, the appointment of the commis-

sion would be unauthorized, and beyond the scope of the power of the city authorities."

The City of Chicago has no jurisdiction over property owned by the government and used for governmental purposes, the jurisdiction of the State of Illinois and the City of Chicago extending only to the extent of the right to serve process and arrest criminals found thereon, and you therefore have no authority to inspect electrical wires in government buildings.

If the property is not *owned* by the government, but is merely *rented*, the city has jurisdiction over the premises and you have authority to inspect electrical wires and exact a fee for so doing from the owner of the premises.

In *U. S. v. Tierney*, 1 Bond (Ohio), 571 (573), the court said:

"The places over which exclusive jurisdiction is granted are those which have been *purchased* by the United States for some of the purposes specified in the constitution, and the grant of power does not extend to a place or tract of land *rented* by the government for a temporary purpose. An unanswerable objection to the exercise of exclusive jurisdiction in this case is that the tract of land was not purchased by the United States *by consent* of the legislature of the State of Ohio, for this consent is essential to the exercise of exclusive jurisdiction by the United States."

With reference to the liability of the County of Cook: The powers of the county are expressly enumerated and defined by statute. There is no power given to it to enact or enforce such regulations as you mention. It is a recognized general principle that municipal and *quasi* municipal corporations can exercise only such powers as are expressly conferred by law or arise by necessary implication. Therefore the power to legislate on the matters referred to has not been granted to the county. Such power has, however, been granted to the

city, and you may require the county to comply with the above sections of the ordinance.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Acting Corporation Counsel.

JUNE 10, 1904.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Last November you forwarded to this department a request for the preparation of rules to govern the administration of police courts, and also for the revision of appeal bonds, forms and other blanks used by the police courts. The matter has been one which required careful consideration, and has therefore been passed upon by several of the assistants, and also by Messrs. Mason and Arthur, who are preparing a revision of the code.

The form of appeal bond (commonly known as Form No. 8) as now printed by you and furnished to and used by the various police courts, conforms on its face to the form provided by statute and therefore should not be changed.

In regard to the best method of providing the prosecuting attorney with a complete record, check and evidence in appeal cases, I suggest the following amendments to our present ordinances which, if adopted, will require the prosecuting attorney to see that they are strictly observed by justices of the peace, police magistrates, and their clerks and the Superintendent of the House of Correction. If said officers perform their duties in carrying out ordinances of this character, this evil may be overcome to a great extent. These suggestions have been adopted by Messrs. Mason and Arthur, and have been incorporated into the revision of the code.

Amend Section 1550—Clerk's daily list—reports—by adding:

“In every case where an appeal is taken or mittimus to the criminal court is issued the clerk shall prepare the tran-

script or mittimus (as the case may be) in duplicate, and shall deliver the duplicate to the city prosecuting attorney at the close of each day's business."

Under the head of "Justices of the Peace", page 327 of the Revised Code of 1897, add a new section to read as follows:

"In every city case heard before a justice of the peace in the City of Chicago if an appeal is taken or the defendant is committed, the justice shall prepare the transcript or mittimus (as the case may be) in duplicate, and at the close of each day's business shall deliver the duplicate to the city prosecuting attorney."

After Section 1153 of the Revised Code of 1897 add another section as follows:

"Section ——. Release of prisoner by order of court—report. In every case where a prisoner is released by the order of any court of competent jurisdiction, the superintendent of the house of correction shall at once report same to the city prosecuting attorney and accompany such report with a copy of the mittimus on which such prisoner was committed to his charge."

To facilitate the performance of this duty the superintendent of the house of correction should be furnished by you with a supply of the form of mittimus commonly used in police and justice courts in committing prisoners to his charge.

I also suggest that you have printed and furnish to the superintendent of the house of correction a supply of a form as follows:

"House of Correction.

"Chicago,, 190.

"To the Prosecuting Attorney of the City of Chicago:

"I beg to inform you that I have this day released, pursuant to of the Court of Cook County, prisoner No., by name, committed to my charge, 190., by mittimus, copy of which is hereto attached.

"

"Superintendent of House of Correction."

I am of the opinion that if these amendments are adopted and strict compliance therewith enforced, the prosecuting at-

torney will thereby be placed in possession of all information necessary to complete his records and successfully prosecute appealed cases.

After examination of the various forms now in use in the police and justice courts in cases where the City of Chicago is a party (which forms were submitted by you with your said letter), I find many changes are imperative and necessary. In order to meet them I have altered many of the forms furnished by you by interlineations and rewritings. I have been obliged to change them to conform to the section numbers of the Revised Code of 1897. In the new revision now in process, these numbers will be changed in the rearrangement of the ordinances, which will require new forms in order to make them conform to the new numbers of the sections and also to the new title of the revised ordinances. I therefore suggest to you that no large supply of the forms herewith be purchased at this time.

At this point I desire to call your attention to the fact that the City Council on January 4, 1904, amended Section 1287 ("Disorderly Conduct") and made the amended section cover both Sections 1287 and 1306 ("Vagabonds and Vagrants") so that the two sections are now combined under one head of "Disorderly Conduct." In this connection I wish to state that both disorderly conduct and vagrancy are defined and made punishable by statute (aside from powers of cities to regulate) under the criminal code.

In cases of vagrancy the criminal code requires the court to exercise a certain particularity in drawing the mittimus which is not specified in cases of other offenses. You will therefore observe that I have prepared two forms of mittimi, one for "disorderly conduct and vagrancy" distinct from the form used in other cases; the distinction arising in that the statute in conviction for vagrancy requires that the mittimus shall state plainly and specifically "the date of the charge, name of complainant, name of defendant, if known, the offense charged, names of all witnesses examined, date and place of trial, the finding of the court and the sentence imposed." I am therefore of the opinion that if a person is convicted of disorderly conduct when he is really guilty of

vagrancy (as may be done under the present amended ordinance), if he should be committed under the present form of mittimus he could be easily released by habeas corpus. If the present disorderly conduct section as amended is to stand, in my opinion Section 1306 of the Revised Code of 1897 ought to be eliminated or revised in the new revision.

It therefore becomes necessary to change the present form of complaint and warrant in this class of cases. This will require some discretion and an accurate knowledge of the ordinance in question for the proper filling in of said form by the clerk or magistrate. I have prepared forms with directions as to striking out all other offenses than the one charged in the specific case. The practice of issuing such complaints and warrants (as I understand is in practice in some of the police courts) permitting officers and police court lawyers to do the "filling in" of the blanks, should be absolutely prohibited and be punished by severe discipline of some kind.

It is not necessary for me to refer to each blank *seriatim* which I have changed, and I have only referred to those which are affected vitally by statute.

In regard to other matters referred to in your said letter, I would suggest the following:

As soon as report is made to the prosecuting attorney as above provided, that officer should be required to examine the bond filed in the cases and ascertain if proper schedule has been made thereon, if bond is properly made out, or if in his opinion it is sufficient, and given by a reliable person.

After the final disposition of the case, he should make a report in duplicate, giving all information obtainable by him regarding such bond and furnish one copy to you, and one to the Corporation Counsel. If insufficient on account of worthlessness of the bond, the name of the surety should be recorded, and if insufficient on account of clerical requirements not having been complied with, the name of the police magistrate or justice of the peace who received such bond should be recorded.

The prosecuting attorney should be empowered to issue a small book, circular or card of instructions to justices of the

peace, police magistrates and the clerks of each, containing, among other things which he may deem proper subjects for instruction, the following:

First. Justices of the peace and police magistrates approving appeal bonds should be required to write thereon the full name and address of the surety on such bond, and should demand a sufficient schedule for each surety.

Second. The names of witnesses for the city should be written in full, together with accurate address on each transcript or mittimus; if citizens, the name and residence—if police officers, the name and precinct.

Third. Justices of the peace and police magistrates should not be allowed to change charge against defendants from some other charge under which the arrest was made to that of "disorderly conduct", unless there is evidence to support the latter charge. Unless the latter is the case, on appeal such cases are generally lost by the city.

Fourth. Police magistrates, justices of the peace and the clerks of each should be instructed in regard to filling in disorderly and vagrancy blanks, strictly following the directions in the notes to the blanks, and should be impressed with the importance and necessity of doing this work themselves, and stating as nearly as possible the exact nature of the offense with which the defendant is charged.

Fifth. In accordance with the opinion of this department of April 28, 1904, addressed to the auditor of your department in regard to the remission of fines imposed by police magistrates or justices of the peace, and in accordance with our recommendation in that opinion, the practice should be discontinued at once and instructions issued to police magistrates and justices of the peace that such practice is without warrant of law and cannot be recognized.

There are many similar matters which are not properly the subject of an ordinance, which the prosecuting attorney could embody in such a book or card of instructions, the necessity for which has undoubtedly impressed itself upon him in his daily practice and with which he would probably be more familiar than any one else. One of the principal subjects re-

ferred to by you in your said letter is the best method of keeping a check on appeals and appeal bonds; and I suggest that in addition to the amendments to and new sections of the ordinances which I have submitted, the prosecuting attorney, whenever an appeal is dismissed (which he will of course learn from his own docket) shall at once ascertain to what justice the procedendo issues and call upon such justice for an immediate action thereunder and report of collection thereon. In the case of police magistrates, you have it within your power to require prompt compliance with your directions in the foregoing regards; but in the case of justices of the peace, you will be required to use great diligence in following up the procedendo and learning whether or not the collections have been made. This proposition was also considered at the seventh (7th) page of our said opinion of April 28, 1904, and the recommendations therein made ought to be followed out.

This, in connection with the other provisions heretofore referred to will give the prosecuting attorney a complete check on the appealed cases, their disposition, the names of witnesses, bonds and collections thereon.

I transmit herewith all forms submitted by you with the corrections I have made thereon to make them conform to the Revised Code of 1897 and amendments thereto to date, and such other corrections and additions to the forms now in use which in my opinion are necessary to make them correct both grammatically and legally.

Very truly yours,

WM. H. SEXTON,
Acting Corporation Counsel.

JUNE 17, 1904.

F. I. BENNETT, Esq., Chairman Committee on Finance.

Dear Sir:

In answer to the communication addressed to the Corporation Counsel, in which you ask for an opinion as to whether a supplemental assessment can be levied to pay for the additional compensation which is proposed to be awarded to Thomas W. Burke in the matter of the improvement of Michigan avenue, from 99th to 109th streets, I beg leave to say:

From the written communications of John A. May, Secretary of the Board of Local Improvements; John B. Hittell, Chief Engineer of Streets; John Ericson, Chairman, Committee on Streets and petition of Thomas W. Burke, I understand that this claim is based upon the fact that the contractor was prevented from constructing the improvement when he desired to do the same and in accordance with his contract, through the fault of the City of Chicago, being delayed by certain underground improvements, the construction of which was delayed by the city; that during this interim caused by said delay, the price of materials and labor advanced, and for these reasons the Board of Local Improvements recommended the payment of this claim.

In view of the fact that the payment of this claim is justified through the delay of the City of Chicago, and not the contractor, and cannot be considered as part of the contract price for said work, according to the original terms of the contract, the same cannot be met by a supplemental assessment proceeding against the private property assessed and benefitted by said improvement.

Very respectfully,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JUNE 17, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Answering your letter of May 25, 1904, with reference to what, if any, steps you should take to compel the laying of grooved rails by the Calumet Electric Street Railway Company in One Hundred and Third street, between Michigan avenue and Throop street, I beg leave to say:

In view of the fact stated in your said letter that the Calumet Electric Street Railway Company has not paid to the City of Chicago any part of the compensation provided to be paid by the terms of the ordinance under which the lay-

ing of said tracks was authorized, the city has a choice of two remedies: First, to repeal said ordinance on account of failure to pay said compensation; second, to take steps for the collection of said compensation. With regard to the second alternative it should be remembered that the company is in the hands of a receiver, appointed by order of the Circuit Court of the United States, and it will be necessary to file a petition in court asking the court to direct the receiver to pay said compensation. In view of the fact that the franchises of said company are valuable, the court will probably direct the receiver to pay said compensation for the purpose of preserving said franchise as an asset for the company. The application to the court could be drawn in such a manner that the effort to collect the compensation would not prevent a subsequent repeal of the ordinance and rescission of the rights on account of failure to pay the amount due under the provisions of the ordinance.

I have stated the alternatives in general terms, but cannot presume to advise you which of these two remedies should be employed. The question is one of policy, which I suggest should be submitted by you to the City Council for determination.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JUNE 22, 1904.

MR. JOSEPH POWELL, President Civil Service Commission,
Chicago.

Dear Sir:

Answering your letter of recent date with regard to what positions in the Law Department are exempt from the operation of the Civil Service Law, I beg leave to say:

Section 11 of the Civil Service Act reads as follows:

“Officers who are elected by the people, or who are elected by the City Council pursuant to the city charter, or whose appointment is subject to confirmation by the City Council, judges and clerks of election, members of any Board of Education, the superintendent and teachers of schools, heads of any principal department of the city, *members of the law*

department, and one private secretary of the Mayor, shall not be included in such classified service."

Section 3 of said act reads as follows:

"Said commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, *except those offices and places mentioned in section eleven of this act*. The offices and places so classified by the commission shall constitute the classified Civil Service of such city; and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned."

Section 6 of said Civil Service Act, so far as material to be quoted, is as follows:

"All applicants for offices or places in said classified service, *except those mentioned in Section 11*, shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character."

It will be seen, therefore, that applicants for offices or places which come within the meaning of the phrase "members of the law department" are, by the provisions of Section 11, specifically exempted from the classified service, and not subject to the requirements of Sections 3 and 6 concerning classification, examination, certification and appointment.

It will be seen that the phrase "members of the law department" is unqualified and is as broad as language can well be made. If this phrase had been used in Section 3 or Section 6 no one can doubt that it would then be interpreted to mean "every member of the law department in whatever capacity he may be therein employed." What would have been a sound rule of interpretation in that case is an equally sound rule of interpretation in the case under consideration. The plain meaning of the language is that all members of the law department—that is to say, the law department as a whole and each and every part thereof—are exempted from the operation of the Civil Service Law.

It has been suggested that these words, "members of the law department", should be construed to mean only those members of the department who are lawyers, and not the

stenographers, clerks, messengers and investigators, and that this interpretation is warranted by the inference that the legislature exempted the law department on account of the peculiarly confidential and professional character of its duties, and that therefore the exemption should only be extended to such members of the department as actually perform professional work of a confidential character. After careful consideration I have concluded that this suggestion is not sound. The duties of the stenographer to whom the head of the law department dictates an important confidential communication, of the messenger who carries it to its destination, and of the investigator upon whose work it may be founded, partake of the professional and confidential nature of their superior, and no valid distinction can be drawn save one of degree only.

Moreover, I believe that with the legislative questions of policy upon which this exemption is based we have nothing to do. Where the language is clear, questions of legislative policy are not to be considered, but the plain letter of the law is to be followed. It is only where the letter of the law is ambiguous that recourse may be had to speculative inquiry as to legislative motives and intents in order to determine the meaning of the legislative words which in themselves are incapable of interpretation without such aid.

The meaning of the phrase "members of the law department", as applied to the City of Chicago may be determined by reference to the city ordinances. Section 73 of Article 1 of Chapter 5 reads as follows:

"There is hereby established an executive department of the municipal government of the City of Chicago, which shall be known as *the Department of Law*, and shall embrace the Corporation Counsel, the City Attorney, the Prosecuting Attorney and such number of assistants and clerks as the City Council may by ordinance see fit to prescribe and establish."

The City Council has from time to time in its annual appropriation ordinance prescribed and established a number of clerks, stenographers, court reporters, investigators and messengers in the department of law, for the offices of the Corporation Counsel, City Attorney and Prosecuting Attor-

ney respectively. The passage of these ordinances is, in my opinion, a compliance with the provisions of Section 73, Article I, Chapter 5, *supra*, and constitutes every person and every office named in said appropriation ordinance, or said branches of said law department, to be "members of the law department", within the meaning of the ordinances and acts aforesaid.

Of course, it is hardly necessary to say that the offices and places under consideration must actually and in good faith be offices and places in the department of law. I do not mean to give any support to the idea that offices and places or positions properly belonging to entirely distinct departments can be placed under the jurisdiction of the law department without other motive or justification than the desire to exempt them from the effect of the Civil Service law. The duties of the places under consideration must have some logical and natural relation to the law department, and the persons holding the offices must perform work which legitimately comes within the functions and duties of said department. The present appropriation bill is not, however, subject to any such implied criticism, and this reservation is here made simply out of an excess of caution, so that the scope of this opinion should not thereafter be misunderstood.

I am therefore of the opinion that the assistants, clerks, stenographers, court reporters, investigators and messengers, and any and all other persons and employes named in the appropriation ordinance for the respective branches of the law department aforesaid, are exempt from the operation of the Civil Service Act.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JUNE 24, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your verbal inquiry as to what steps you have the power to take and how far you may lawfully use the police force to prevent the exhibition of unlawful and obscene advertising matter, I beg leave to say:

Section 233 of the Criminal Code and Section 1296 of the City Code make the possession of such advertising matter and the exhibition thereof, offenses punishable by severe penalties.

The offense is, in my opinion, a continuing one. and if so, under the provisions of Paragraph 84 of the Cities and Villages Act, "policemen in cities have the power to arrest, *with or without process*, all persons violating any ordinance of the city or any criminal law of the State."

The arrest should in ordinary cases be based upon a complaint and warrant, the arrest without process being resorted to only when there is danger of being unable to apprehend the offender, if the arrest be delayed for the purpose of obtaining a warrant.

Under Section 2 of Division 8 of the Criminal Code, the chapter on searches and seizures, search warrants may be issued by any judge or justice of the peace to search for and seize obscene pictures and publications.

Although in all ordinary cases the remedy by search warrant should be employed, yet there may be cases where immediate seizure without process becomes necessary for the purpose of preventing the destruction of the evidence upon which the arrest is based. In such case I deem it entirely safe for the officer to take possession thereof for the purposes aforesaid, pending the issuance of a search warrant. Such matter being unlawful is not to be considered as property in the eye of the law and may accordingly be taken or destroyed without causing any damage which the law can recognize.

Of course, as in every other case, the officer, if acting without process, must determine whether or not the offense has been committed. I think it no more difficult for a man of ordinary common sense to determine whether or not a given print or picture is obscene than to determine whether an offense has been committed in many other cases. If the officer is in doubt he can refer to superior authority for instructions.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

JUNE 24, 1904

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have before me the letter of Dr. A. R. Reynolds to yourself, dated June 13, 1904, suggesting the advisability of prosecuting owners of dogs who permit them to run at large unmuzzled, and your inquiry endorsed thereon as to what can be done.

Section 549 of the Revised Code of Chicago, of 1897, reads as follows:

"Every dog shall be provided by its owner, or keeper, with a leather or chain collar, to which a license tag shall be securely fastened, and every dog shall also be muzzled, if so ordered, as hereinafter provided. No dog shall be permitted to remain within the limits of the City of Chicago, unless the owner, or keeper, thereof, shall have caused such dog to be registered and licensed, and provided with such collar and tag, and be muzzled, if so ordered, and any owner, or keeper, of a dog failing to provide such collar, tag or muzzle, if required, shall be subject to a fine of five dollars for every such dog so unprovided, to which fine shall be added, if unlicensed, the amount of the license fee, and costs, if any, incurred."

It will be seen that this section provides a fine of five dollars for every owner of a dog who shall fail to provide such dog with a muzzle, if required to do so.

Section 551 of the Revised Code provides that:

"Whenever the Mayor of this city shall deem it necessary, he shall issue an order prohibiting for a certain time therein specified all dogs from running at large on any street, alley or other public place, in this city, unless such dogs be securely muzzled, so as to effectually prevent them from biting any person or animal, or led by a line or chain, which order shall be published in a daily newspaper of general circulation in the City of Chicago."

It will be seen, therefore, that if you deem it advisable to do so, you have the power to issue a general proclamation to all owners and keepers of dogs, requiring them to provide such dogs with muzzles. Such order must be published in a daily newspaper of general circulation in the City of Chicago,

and any one who thereafter permits a dog owned or kept by him or her to run at large without a muzzle, may be prosecuted under Section 549, and upon conviction will be subject to a fine of five dollars and costs.

Yours very truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JUNE 30, 1904.

MILTON J. FOREMAN, Esq., Chairman Committee on Local Transportation, of the City Council.

Dear Sir:

In accordance with your verbal request that I furnish an opinion to your committee on the questions of law arising in regard to the proposed ordinance for the Terminal Loop addition to the Halsted street line of the Calumet Electric Street Railway Company, I beg leave to say:

First. On June 17, 1904, I addressed a letter to the Commissioner of Public Works, a copy of which is hereto attached. This letter was written in answer to a letter inquiring what steps could be properly taken by the commissioner to compel the laying of grooved rails by the Calumet Electric Street Railway Company in 103d street, then about to be paved. In examining the company's ordinance with a view to answering the above question, I discovered that the 103d street ordinance called for the payment of fifty thousand dollars compensation by said company to the city, in annual installments, and that nothing had ever been paid on account of such compensation. I understand that this question has been submitted to the City Council by the Commissioner of Public Works. Before any additional franchises are granted to this company it might be advisable for your committee to determine whether or not you could deal at all with a company when it is in arrears in payment of the amounts due the city under the provisions of its franchise ordinance.

Second. I do not believe that it is advisable to grant any franchise rights or rights of occupancy of any sort in the streets of Chicago to court receivers. In theory at least, receivers are officers of the court, whose term of office is not only indefinite, but limited to the shortest possible time required to dispose of the property in litigation. The receivership in question is a very peculiar receivership, and bids fair to have an unusual degree of permanency, one not contemplated by law but occasioned by the unusual circumstances of the litigation; and yet at any moment the receivership may be terminated. There are also serious legal objections against municipalities granting franchises to a receiver or an individual. It was at one time decided that a street railway franchise could not be given to an individual, and although this decision has been "distinguished" by later decisions, yet the safer rule undoubtedly is that these grants be made to corporations organized under the Corporation Act and subject to the provisions of the Horse and Dummy Act, so that the salutary provisions of both of said acts may be secured and made applicable to the relations of the city and its grantee. I would regard a franchise grant to receivers an experiment not only of doubtful utility but presenting a possibility of serious danger and one to be justified only under extraordinary circumstances and for special and very cogent reasons.

Third. If a franchise is to be granted at all, it should, in my opinion, be granted to the Calumet Electric Street Railway Company; but here also the situation is not free from difficulty. This corporation is not performing any of its corporate functions, nor is itself discharging the duty cast upon it in the transportation of passengers over its routes. The exercise of these functions and the performance of these duties have been suspended by the receivership. The City Council has a right to and should consider the personality of the grantee, whether it is capable of performing those duties cast upon it as the chief consideration of the grant, to-wit, safe and efficient transportation. If this were a new franchise or a substantial extension of an existing line, or for an independent branch of the company's system, I should unhesitatingly advise against making the grant; but in view of

the fact that it is really but a slight extension of the company's routes, adding but little to their mileage and providing only a terminal loop for the better service of the public, I think that your committee would be justified in passing upon this question as a special one, striking a balance of the arguments pro and con and reaching a conclusion strictly limited to the case in hand and not to be regarded as a general precedent.

I have not considered at all the form of the ordinance, as the questions above referred to are all threshold questions, the determination of which may make it unnecessary to consider the ordinance at all. I have only this to say, that if you determine to consider the matter and grant any rights whatever, the language of the ordinance does not meet my approval and must be very materially altered and the whole ordinance redrawn. This I shall be entirely willing to undertake whenever your committee shall advise me of your conclusion upon the questions already presented.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JULY 6, 1904.

MR. JOHN L. HEALY, Assistant City Pay Master.

Dear Sir:

Replying to your letter of June 30, asking whether your department is obliged to recognize a notice from Louis Weber & Company of an alleged assignment of wages, where such firm refuses to exhibit the original assignment, I beg leave to advise you that the courts hold that no formal notice is necessary, and it is enough if such information is communicated to the debtor as gives him fully to understand that the alleged assignee is the owner of the claim. However, the city is not conclusively bound, in my opinion, by the mere statement of one of the above firm that they hold an assignment. They should produce the assignment, so that you may know just what its terms are, whether it is for all or a portion of the sum due assignor or whether the assignor had any assignable

interest at the time he executed the assignment and power of attorney.

2 Am. & Eng. Encyc. Law (2d Ed.), 1078.

Meghan v. Mills, 9 Johnson (N. Y.) 64.

City of Chicago v. People, 98 Ill. App. 520, 1.

In the case of the *City of Chicago v. People*, *supra*, the court said:

“The doctrine is well settled that a municipal officer cannot assign his unearned salary. His undertaking so to do is but an undertaking, unenforcible and of no validity. The law also prohibits assignments of salary being had by indirection or effected by having the official appoint an attorney authorized to receive the salary and turn the same over to an assignee.”

“If assignments of the salaries of public officers were permitted, then the assignees would be entitled to receive the salaries directly, and thus to take the place of the assignors in respect to the emoluments, leaving the duties to be discharged by said officers, a barren charge, to be borne by the assignees. Such a condition of affairs would inevitably produce results disastrous to the efficiency of the public service.”

“It is also urged as to the June salary that the assignment of it was not made until after it had been earned; that is to say, that the power of attorney to collect the unearned salary of the relator having been made, the particular salary was not designated, but left blank; and that ‘June, 1900,’ thus making the power of attorney applicable to the salary of that month, was not inserted until June 29th. This was but an attempt to do by indirection what the law prohibits. The power of attorney, though irrevocable in terms, does not amount to an assignment when no assignable interests exist at the time the power is made. *Lehigh Valley R. Co. v. Woodring*, 116 Pa. St. 513-517.”

I am therefore of the opinion that you are entitled to such information in regard to these alleged assignments of wages as will enable you to decide whether or not the claim-

ant has an interest therein that was legally assignable. Anything short of this is not sufficient and will not bind the city.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 7, 1904.

MR. J. A. RICHERT, Chairman, Sub-Committee of the Police Committee, of the City Council.

Dear Sir:

I have a communication of recent date requesting the opinion of this department as to whether (a) the City Council has the power to constitute patrol drivers regular members of the police force of the City of Chicago by the passage of an ordinance, and (b) whether the Police Pension Board, provided the council has this power can be compelled to place patrol drivers upon the lists of the pension fund.

The ordinance attached to your communication is in my opinion in conflict with Section 1, Rule 10 of the rules adopted by the Civil Service Commission of the City of Chicago. This rule provides that: "All original appointments on the police force shall be as second class patrolmen." The rule then provides that applicants for the police force must at the time of their examination therefor be between twenty-one and thirty-five years of age, not less than five feet seven inches in height and of a certain weight and physical measurement. The physical examination for patrol wagon drivers, I am informed by the Secretary of the Civil Service Commission differs materially from the examination given applicants for the position of second-class patrolmen on the regular police force. A certain physical standard being maintained in the case of police officers which is not required of wagon drivers. The mental examination required of the two classes, patrolmen and wagon drivers is, necessarily, essentially unlike. The act to regulate the Civil Service of Cities, approved March 20, 1895, gives the commission by Section 4 the power to make

rules to carry out the purposes of the act and for examination, appointments and removals in accordance with its provisions and the power to make changes from time to time in the original rules. Section 10 of the act provides for appointment after examination from those standing highest upon the register for the class or grade to which the position belongs. I think that under the statute and the rules of the commission all police officers must be placed upon the police force in the manner provided for by said act and under the rules made by the commission. I think that any other method than that prescribed by the Civil Service Act and rules cannot be availed of to place any member or members of the police department upon the police force. Were this not so, it must follow police matrons, janitors, operators and other members of the police department could by the passage of an ordinance become *ipso facto* officers of the same rank and position as the regularly examined and appointed Civil Service police officers.

I am of the opinion that it is not within the power of the City Council to create patrol wagon drivers regularly constituted policemen and members of the force.

Regarding your second question, it might be said since none but regularly constituted members of the police force can under the law be eligible for pensions, it were unnecessary to touch upon this inquiry further. This department has, however, in numerous cases held that only those members of the regularly constituted force who are subject to the exposure and dangers of police officers can be placed upon the pension list. The General Superintendent of Police informs me that as a question of fact the patrol drivers are not subject to the hazards incident to the service of the regularly constituted members of the force and that records of disabilities in his office will abundantly substantiate this fact.

Respectfully yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

JULY 22, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have been requested to prepare an opinion for you as to whether or not you have authority to release dogs from the pound, and I beg to advise you that I find no such authority under the laws of the city or State.

On the contrary, Section 554 of the Revised Code, as amended on July 14, 1904, and July 18, 1904, provides in part as follows:

"For every dog taken up and confined in the dog pound, as provided in this ordinance, a redemption fee of three dollars, together with the amount of the unpaid license tax, if any, shall be paid to the City Collector for the use of the city; and upon procuring the certificate of the City Collector stating that said amount has been paid, and paying to the Pound Master for taking up such dog the further sum of fifty cents, and the cost of keeping such dog, not to exceed twenty-five cents per day, and cost of advertising, if any, as hereinafter provided, the owner or keeper thereof . . . shall be entitled to redeem such dog. . . ."

In the absence of any authority to do so, releasing a dog from the pound without requiring payment of the redemption fee, is tantamount to the remission of the fine or fee fixed by the council under the above section, and is not within the power of the Mayor.

In the case of *City of Newton v. Bergbower*, 63 Ill. App. 203, it is said:

"The power given by Sec. 9, Art. 2, Part 1, of the Incorporation Act, to the Mayor, is to *release* any person *imprisoned* for the violation of any city ordinance. This does not include the power to release the judgment under which such imprisonment may be made."

I am of the opinion, therefore, that the proper procedure, under the ordinance, for securing the release of a dog from the pound is by paying the three dollars redemption fee to the City Collector, together with the amount of the unpaid license fee, if any, procuring his certificate to that effect, and paying the sum of fifty cents to the Pound Master; together

with the cost, not to exceed twenty-five cents a day, for keeping the dog, and the cost of advertising, if any.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JULY 22, 1904.

MR. R. B. WILCOX,

Supervising Engineer of Steam Boilers and Steam Plants.

Dear Sir:

I acknowledge receipt of your letter of June 17, asking for a construction of Section 10 of the smoke ordinance, under the following circumstances:

Where three notices are sent on violations observed at different times, and suit is started, may a second suit be brought on notice for a fourth violation, by using as a basis the notices sent on the last two violations?

The material portion of said section reads as follows:

“The emission of dense smoke from the smokestack of any boat or locomotive, or from any chimney anywhere within the city, shall be deemed, and is hereby declared to be, a public nuisance; but no prosecution for the emission of dense smoke shall be commenced, unless within ten days prior thereto at least three notices shall have been mailed to the offender that dense smoke has been seen emitted from his premises.”

I am of the opinion that a second suit may be brought for the fourth violation, and it may be based on the notice served for that time, together with the notices served on the two preceding times, even though the latter notices were used as the basis for a previous suit.

Answering your second question as to whether the present ordinance may be changed by putting locomotives, tugs and steam boats on a different basis from that of stationary plants; that is to say, by eliminating as to them the provision as to notices—I beg leave to say that in my opinion such an ordinance would be valid. It would not be discriminating be-

tween persons and companies engaged in the same trade or pursuit, and would operate equally on all classes coming within its provisions.

By Clause 75 of Section 1 of Article 5, the council has been granted the power "To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist."

In the cases of *Marshall Field & Co. et al. v. City of Chicago*, 44 Ill. App. 411, and *Harmon v. City of Chicago*, 110 Ill. 406, it has been held that the emission of dense smoke from a stack or chimney, which results in damage to property and annoyance to the public at large, is a public nuisance *per se*.

However, aside from the questions you ask, I am of the opinion that it is not necessary to amend the ordinance so far as concerns locomotives. The above mentioned portion of the ordinance consists of two parts: one declaring that the emission of smoke is a nuisance; the other providing a method of procedure. If you should construe the ordinance as meaning that a railroad company should not be prosecuted unless a certain locomotive shall be detected three times within ten days emitting dense smoke from its stack, that would make the ordinance practically inoperative as to railroads, as after the first or second notice, the offending company could remove the engine outside the city limits until the ten days had expired. I am of the opinion, therefore, that the ordinance should not receive such a construction, but should be held to include any locomotive on the company's premises.

The matter of the amendment of the ordinance for the establishing of more efficient smoke regulations on vessels will be given further consideration.

Respectfully yours,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 6, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In re People ex rel. Stern vs. City, a mandamus suit to require the issuance of a pawnbroker's license, I beg leave to report:

Judge Hanecy holds that the section of the Revised Code of 1897 which requires a pawnbroker to hold a pledge for twenty-four hours, in order to give the police an opportunity to examine it if thought necessary, is illegal and void as impairing the constitutional rights of the owner of property. He holds that the owner of property may redeem it immediately, or at any time, and that an ordinance requiring its detention for an hour would be invalid. In this he is supported by a decision of the Supreme Court of the District of Columbia.

I am, however, unable to assent to the soundness of these views. I believe that since every one is supposed to know the law, the person who pledges property must be assumed to know that the ordinance requires it to remain in pledge for at least twenty-four hours, and that being charged with knowledge of the existence of the ordinance, the making of the pledge is an assent to its detention for said period. However this may be, I am of the opinion that the question is of sufficient importance to justify an appeal, so that the decision of the court of last resort may be had, particularly in view of the fact that, if this decision of the court is acquiesced in, no adequate or efficient supervision can be had over pawnbrokers.

Another question arises for immediate determination. It has been your policy in ordinary cases to comply with these mandamus orders and then to appeal. This general rule, however, has always been subject to the exception that if the compliance with the order of court would entitle a person to enjoy privileges to which he was clearly not entitled, or to establish precedents injurious to the rights of the public, the city might in such cases assume the responsibility of perfecting its appeal and postponing compliance with the order of court.

until the decision was affirmed. Will you please indicate your views in regard to this question as applied to this case?

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 8, 1904.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

I am in receipt of your favor of the 4th inst., requesting an opinion as to whether on the following facts the board has the power to accept the bid of the M. P. Byrne Company, which is the lowest bid as a whole, for the Jackson Park Avenue System of Sewers, and to reject the bid of James Healey, which is for only three sections of said work, but which is the lowest bid for said three sections: On August 3d, bids for the Jackson Park Avenue System of Sewers were opened in accordance with the attached advertisement for bids, the pertinent part of said attached advertisement being as follows:

“For the purpose of convenience in carrying on the work and because of the great diversity of the nature of the work to be done, the work will be divided into various sections. Contractors may bid on the contract as a whole or on the sections separately, as follows, to-wit:”

Five bids were received—three for the work as a whole, one for three sections only, and one for one section only. M. P. Byrne Company's bid is the lowest for the entire work, but James Healey's bid is the lowest for the three sections on which he bid. Healey now contends that the board cannot legally let the contract as a whole to the M. P. Byrne Company, but that he is entitled to the contract for the three sections on which he bid.

In reply I beg leave to say that I am clearly of the opinion that the board may legally let the contract to the M. P. Byrne Company, provided that it is the lowest responsible bidder and no other legal objection can be urged against the

right of the board to the bid than that of Mr. Healey, above stated.

Section 77 of the Special Assessment Act vests the board with a broad discretionary power in the matter of rejecting and accepting bids. In part, this section provides as follows:

“Said Board of Local Improvements may reject any and all proposals or bids, should they deem it best for the public good. . . .”

There are many reasons why it would be for the best interest of the public good to reject the bid of Mr. Healey. Since his bid does not cover the entire work, if it were accepted the board would be compelled to re-advertise for further bids on the remaining sections, and, if in response to such advertisement, there were not sufficient bids to cover all of the sections advertised, successive advertisement would become necessary. And, in the end, assuming that there were sufficient bids to cover all the sections it might happen that the aggregate of the lowest bids for the sections separately would exceed the lowest bid for the contract as a whole and thus the very purpose of the board in advertising for bids on the sections separately would be defeated, since the object of the board in receiving bids for separate sections was to compare the aggregate of the lowest bid by sections with the lowest bid as a whole and accept the former if they aggregated less than the latter.

In my opinion I think there is no doubt whatever as to the power of the board to reject the bid of Mr. Healey, on the facts stated herein.

Very respectfully,

FRANK JOHNSTON JR.,

Assistant Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 9, 1904.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

Answering your letter of August 6th, in regard to Para-

graph 5, Section A7 of the revised ordinance in regard to theaters, I beg leave to say:

The part of said paragraph under consideration is as follows:

“Seats shall be not less than twenty inches in width, measured at the top of the seat backs.”

This language literally construed is meaningless. It must be so read as to effectuate, if possible, the intention of the council. I am inclined to believe that their intent was that the seats should be twenty inches apart measured from center to center of the top of the seat backs, and that there should be substantially twenty inches for each occupant of the seats. I do not mean to say that a small chair materially less than twenty inches in width would comply with the intent of this ordinance if such seats were set so as to be twenty inches apart from center to center. I think the most that could be said would be to authorize the use of a seat that was practically twenty inches in width, say, eighteen, nineteen or twenty inches, if so set as to measure twenty inches from center to center.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

AUGUST 11, 1904.

A. J. EDDY, Esq.,

President Board of Trustees of Police Pension Fund.

Dear Sir:

I have a communication from you of recent date requesting the opinion of this department as to:

First. Whether the widows and children of superannuated police officers who died after 1887 and before 1889 become entitled to a pension by virtue of the possible retroactive effect of the Pension Act of 1899.

Second. Whether moneys taken from gambling houses during raids belong to the Police Pension Fund under the law which entitles that fund to the proceeds of all sales of unclaimed, lost or stolen property, or whether said moneys are

the property of the school fund, under the statute which gives to said fund moneys resulting from fines and forfeitures.

Third. Whether the money paid the city for the services of police officers detailed to theaters should go to the City Treasurer or to the Police Pension Fund, under Paragraph 3, Section 1 of the Police Pension Act of May 16, 1903, which gives to said fund all moneys paid for special details of police.

First. The Police Pension Law of 1887 provides for the payment of pensions to those officers, whom for the sake of convenience, I shall term superannuated officers, who were over fifty years of age and had served for twenty years upon the police force. This act, however, made no provision for any pension to be paid to the widows or children of such beneficiaries upon their decease. The amendatory act of 1899, after providing for the payment of a pension to persons who had served for a period of twenty years or more upon the regularly constituted police force of any city, village or town, and had reached the age of fifty years and had severed their connection with the police force, provided further that the widow, or minor child or children under sixteen years of age, if any should survive the beneficiary, should be entitled to the same pension which the husband or father had been in receipt of, provided that upon the re-marriage of any such widow of any deceased member, the pension should cease.

It is thus seen that the question involved is whether the amendatory act of 1899 should be regarded as having such retroactive effect as to entitle those widows and minor children who are not entitled to a pension under the former act, to receive a pension by virtue of said statute of 1899.

The general rule with respect to retroactive statutes is that those not remedial in their nature will not be construed to operate retroactively unless the intent that they shall do so is plainly expressed or made to appear. Where the intention as to being retroactive is doubtful, the statute will be construed as prospective only, unless the language clearly indicates that it was intended to have a retroactive effect. In the absence of a plain expression of design, a statute should be construed as prospective only, although its words are broad enough in their literal extent, to comprehend existing cases.

(*Hill v. Nye*, 17 Hun. 467; *Dash v. Van Kleeck*, 7 Johns, 477; *Fultz v. Fox*, 9 B. Mon. 499; *Quilter v. Mapleton*, Law Rep. 9 Q. B. Div. 672.)

I am therefore of the opinion that the act of 1899 cannot be construed as granting a pension to widows and children of superannuated officers who died prior to the passage of that act; but that it simply grants a pension to the widows and children of superannuated officers who died after the passage of the amendatory act of 1899.

Second. Clause 6 of Section 1 of "An Act to provide for the formation and disbursement of the Police Pension Fund," approved May 16, 1903, provides that there shall be set aside, to constitute a police pension fund (among other moneys), "the proceeds of all sales of unclaimed, lost or stolen property." (Hurd's Revised Statutes, 1903, Ch. 24, Section 391, p. 364.)

Section 1, Par. 269 of Art. 14, Ch. 122, Hurd's Revised Statutes, 1903, p. 1698, provides:

"All fines, penalties and forfeitures imposed or incurred in any of the courts of record or before any justice of the peace of this State, except fines, forfeitures and penalties incurred or imposed in incorporated towns or cities for the violation of the by-laws or ordinances thereof shall, when collected, be paid to the county superintendent of schools of the county wherein such fines, penalties or forfeitures have been imposed or incurred, and said county superintendent of schools shall give his receipt therefor to the person from whom such fine, forfeiture or penalty was received. . . ."

The question presented is whether the money taken in raids upon gambling houses can be said to be a fine, penalty or forfeiture, or whether it is embraced by the terms unclaimed, lost or stolen property. I think the money in question clearly and properly comes within the latter definition. Forfeiture means the loss of something as a penalty for doing or omitting to do a required act, the taking of some property, right, privilege or franchise, or benefit, from one person and transferring the same to another. The term includes the loss as a penalty and the transfer of the thing to another without the owner's consent, for the violation of some law,

duty, or obligation. (*U. S. v. Ulrici*, 3 Dil. (U. S.) 532; *Wakefield v. Johnson*, 26 Ark. 506.)

A fine is a pecuniary penalty and is commonly (perhaps always) to be collected by suit of some kind. It will thus be seen that the property under discussion cannot possibly be classed as a fine, and it only remains to determine whether it may be considered as a forfeiture. From the definition given above it is apparent that to constitute a forfeiture there must exist ownership of the property forfeited in the person from whom it is taken or transferred. The whole question, in my opinion, hinges upon the right of property of the money in the gamblers, or its non-existence. As you have suggested, I think no such right exists in gamblers to money which they have illegally taken from persons, any more than a right of property would exist in a burglar concerning property stolen from others. The right of property so far as it exists is in the original owners of the money who have lost it at play, and the gamblers unlawfully winning this money acquire no right or title to the money. In this view of the case, the money taken from the gamblers is not a forfeiture. On the other hand, this property easily falls within the definition of unclaimed, lost or stolen property. The word "unclaimed" as used in Paragraph 6 of the Pension Act, undoubtedly means unclaimed by a person having a legal and valid right to its possession. The fact that it is claimed by the gamblers themselves is of no moment. It must be claimed by its rightful owners.

I am clearly of the opinion that the Pension Fund is entitled to the money which you report to be now in the hands of Mr. Cregier, the custodian.

Third. Clause 3 of Section 1 of the Pension Act of 1903, quoted above, provides that there should be paid into the pension fund "all moneys paid for special detail of police officers."

Section 46, page 2068, Council Proceedings, January 18, 1904, provides that there shall be employed in every theater:

"One policeman detailed by the Superintendent of Police, who shall be in the uniform of the Chicago Police Department, who shall be on duty at such theater during the whole time it is open to the public; shall report to and be

subject to the orders of the Superintendent of Police; carry out all orders of said superintendent; see that the provisions of this section are properly enforced and maintain proper decorum in such buildings.”

In the attached communication from the Secretary of the Committee on Finance, these policemen are not considered as a special detail, but under the ordinance a regular detail, and consequently the committee declines to order this money paid to the treasurer of your board.

I am inclined to think that the ruling of the committee upon this question is correct. This detail of officers to theaters has now been done away with under the new ordinance, and I understand from the Chief of Police that the theater managers only paid two-thirds of the officers’ salary while they were stationed in the theaters. The provision having been in effect but a short time, the amount received for the services of such detailed officers was comparatively small. I think the officers sent to theaters under an ordinance provision requiring theater managers to have an officer in uniform at their theaters during performances, is a regular detail. Special details comprise such assignments as sending police officers to dances, picnics and gatherings of a similar character where the officers are ordered to report to the person in charge of the gathering and are for the time being under his orders. This was not so in the case of officers detailed to theaters, they being at all times under orders of their superior officer.

I think, in contemplation of law, the officer detailed under the ordinance to safeguard the public in theaters, comprises a regular detail, and consequently, the money paid on account of such detail is not properly applicable to the pension fund.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 11, 1904.

MILTON J. FOREMAN, Esq., Chairman Committee on Local Transportation.

Dear Sir:

I have a communication of recent date from you requesting the opinion of this department as to whether the city has the power to exact compensation from various telephone and telegraph companies for the privilege of crossing under the bed of the Chicago River at points near Washington street and La Salle street.

The Chicago Edison Company stands in a somewhat different position from the other companies named in your communication, from the fact that under an ordinance passed January 4, 1889, this corporation was specifically given permission to lay conduits or tunnels "under the Chicago River and its several branches" for a period of twenty years from the date of the passage of the ordinance. As to this company, therefore, I am of the opinion that it has the right to demand from the Commissioner of Public Works a permit to cross under the bed of the river, and it will be obligatory upon the commissioner to grant such permit without any other charge upon the company than perhaps a reasonable inspection fee.

Were the conduit in question to be built under a public street, I am of the opinion that a larger occupation tax or inspection fee could be exacted from this company; but assuming as I do that the tunnel is to start from and end upon private property, I think the inspection fee charged would have to be strictly commensurate with the cost to the city of the services of inspection.

Concerning the right of the telegraph companies mentioned in your communication to cross under the bed of the river: These companies are maintaining telegraph lines in the center of the city without any ordinance rights therein. Their rights in the down town district in the city are conferred by an act of Congress, passed July 24, 1856, known as the "Post Roads Act", under which they are given the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of

the United States, or which have been or shall be declared to be such by law, and over, under or across the navigable streams or waters of the United States. By act of Congress in 1872 all railroads and all letter carrier routes in any city or town are expressly declared to be post roads, and by a subsequent enactment of March 1, 1884, all public roads and highways were declared to be post roads. The acts in question are fully within the constitutional power residing in Congress, and apply to telegraph companies then existing or thereafter organized.

Section 4 of Chapter 134, Revised Statutes of Illinois, provides that no telegraph company shall have the right to erect any poles, posts, piers, abutments, wires or other fixtures of their lines upon any street, alley or other highway or public ground within any incorporated city, town or village, without the consent of the corporate authorities of such city, town or village; that such consent must be in writing, and recorded in the recorder's office of the county.

The Chicago River has been judicially declared to be a navigable stream, and in my opinion the acts heretofore referred to give the telegraph companies full power to cross under its bed, a necessary condition precedent to such crossing, however, being the permission of the city authorities; but the power to cross being a matter of right in the companies, the permission cannot be unreasonably withheld, nor can an excessive or unreasonable license fee, nor anything in the nature of an occupation tax be exacted from the companies. As they are going to cross from and to private property, the most that can be exacted from them is a reasonable inspection fee for the work of the city inspectors in seeing that the conduits are in such condition as to not jeopardize the safety of persons or property.

The foregoing remarks, of course, are based upon the assumption that the tunnel in question is to start from and end upon private property. If such is not the case and the right is asked to construct a tunnel under public streets of the city, all the corporations can then be compelled to pay an occupation or inspection tax of considerable amount. Telegraph companies in many jurisdictions have been subjected

to a tax upon their telegraph poles constructed in the public streets, and such an exercise of power by the municipality has been uniformly upheld. A similar tax, in my opinion, could be imposed upon telegraph companies using space under the surface of the public streets for purposes of a conduit.

The opinion of this department, heretofore given, I enclose herewith.

In conclusion, I am of the opinion that your inquiry as to whether compensation can be exacted for the privilege of crossing the river must be answered in the negative if the ends of the conduit are to be constructed on private property; but if the conduit is to run under the public street, adequate compensation can be exacted by the city from these corporations.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

AUGUST 19, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In answer to your request for my opinion as to the questions of law involved in the communication from the Chicago Federation of Labor and other labor organizations, in regard to the alleged breaches of the city ordinances by the use of certain buildings at the Stock Yards for the lodging of workmen there employed, I beg leave to say:

First. It is claimed by said labor organizations that the packers and stock yards firms referred to in said communications are conducting a lodging house within the meaning of Section 1077 of the Revised Code. Said section reads as follows:

“A lodging house shall be taken to mean and include any house or building or portion thereof in which persons are harbored or received or lodged *for hire* for a single night or

for less than a week at one time, or any part of which is let for any person to sleep in for any term less than a week."

This special and artificial definition of the term "lodging house" applies to the whole of Article XXIII. of the Revised Code, entitled "Tenements and Lodging Houses."

The question presented is whether or not the employes are "lodged for hire" in the packing houses. No evidence has been presented by the labor organizations to establish the fact that the packing house employes are charged anything for their lodging in said packing houses. The packers state that meals and lodging are furnished to their employes temporarily without charge, and that the same rate of wages are paid to those who sleep and eat in the packing houses as are paid to those who sleep and eat in their own homes.

I am of the opinion that the intention of the council in passing the tenement house ordinance was to legislate only with regard to those persons who carry on that business for a financial reward, and that Section 1077 above referred to, fixing as it does a definite meaning of the term "lodging house", excludes from the operation of the ordinance places where people are temporarily lodged *without charge*, either for motives of hospitality, charity, convenience or personal safety.

I therefore conclude that the provisions of the tenement house ordinance have no application to the matter under discussion, unless it be shown that lodgings are being let *for hire* therein, in which case all the provisions of said ordinance would be applicable.

Second. Reference is made in said communication to the provisions of the building ordinances, and among others referred to are Sections 65 and 153. Section 65 reads in part as follows:

"As a means of reference in this ordinance, buildings erected within the fire limits . . . shall be divided into classes as follows: . . .

"Class II. This class shall embrace all buildings used as residences for three or more families, all hotels, all boarding or lodging houses occupied by twenty-five or more persons, and all office buildings."

It will be observed that this classification is confined explicitly to "buildings erected within the fire limits."

Section 153 above referred to contains the following language: "For all other buildings of Class II. there will be required for each building at least two flights of stairs." Said section then proceeds to describe the requirements of such stairs. But, as already seen, buildings of Class II. are by the provisions of Section 63 confined entirely to buildings within the fire limits.

I am informed that all of the buildings referred to in said communication are outside the fire limits, with the exception of the buildings belonging to the Omaha Packing Company. I am of the opinion, therefore, that none of the packing houses under consideration come within Section 153, or that part of Section 65 of the building ordinances above quoted, except the buildings of said Omaha Packing Company.

Third. Section 65 of the building ordinance contains as its last sentence the following language:

"And it shall be unlawful to apply such building to a new or different use than that to which its structure and equipment adapts it under this ordinance, unless the requirements of this ordinance for such new or different use shall first have been complied with, and a permit for such alteration of use shall have been first obtained from the Commissioner of Buildings."

The buildings under consideration were constructed and equipped as packing houses, in which animals were intended to be slaughtered and their carcasses converted into meat products. Such use comes within the terms of Class I. as defined in said Section 65, to-wit: "Buildings devoted to the sale, storage or manufacture of merchandise." They are now being applied "to a new or different use", to-wit: temporary use for lodgings.

While this does not convert the buildings into "lodging houses" within the meaning of that term as defined by Section 1077, yet I cannot escape the conclusion that it brings them within the last part of Section 65 above referred to—that it makes them for the time being "lodging houses" within

the meaning of that term as used in the definition of Class II. above quoted. While these buildings still are and continue to be packing houses, they are none the less during the night time, and so far as used for housing men, applied to the use of "lodging houses", and as such come literally within the provisions of the last sentence of Section 65, *supra*. Clearly it was the purpose of the council by this legislation to control the matter of the uses to which buildings shall be devoted, and to prevent a building being constructed for one purpose and then used for another purpose for which it was not constructed, and to which it was not adapted, and for which stricter requirements as to construction or equipment were provided by law. Any other interpretation of this ordinance would render this provision of the law nugatory. Here the council has explicitly said that it shall be "unlawful" to do this very thing until the requirements of the ordinance for the new use have been complied with, and until a "permit for such alteration of use" has been first obtained.

It may be claimed that this last provision of Section 65 is also confined to buildings within the fire limits. I think not. This last quoted provision of Section 65 is so general in its character that I am of the opinion that it refers to all buildings within the city limits, and that only that portion of Section 65 which creates the classification is limited in its effect to buildings within the fire limits; but however this may be, the provisions of Section 160 clearly apply to all buildings within the City of Chicago. Said Section 160, so far as now necessary to be considered, reads as follows:

"Excepting in cases where the immediate safety of the occupants of buildings is concerned, nothing in this ordinance shall be considered as requiring alterations in the construction or equipment of buildings existing at the time of the passage of this ordinance and at that time complying with the ordinance at that time in force. If, however, it is desired to . . . modify the construction of any existing building, or to make any change in its use or occupation which will transfer it from one class as recognized by this ordinance to another, then . . . before such change in its use or occupation may be made, the entire building shall be re-constructed or

modified in such manner as to bring the same . . . when occupied for its new and different purposes, in accordance with the provisions of this ordinance."

Clearly the provisions of this ordinance leave no room for doubt. The very question now under consideration is the "change in the use or occupation of an existing building," and this section particularly requires the reconstruction of the building in accordance with the provisions of the ordinance before "such change in its use or occupation may be made."

Whatever conclusion might be reached as to the propriety of such legislation, or as to the advisability of permitting, under the stress of special circumstances, their being used for a purpose different than that for which the buildings were constructed, these considerations of what the law *ought to be* must all yield to the plain provisions of the law *as it is*, and the remedy, if any, must be sought by way of an amendment of the law and not by a forced or warped construction of its plain provisions.

The buildings under consideration fail to comply with the provisions of Section 151 of the building ordinance, as follows, to-wit:

"In hotels or lodging houses or boarding houses, ninety feet or less in height, there shall be a fire stop of brick, concrete or tile between the ceiling and floor in each floor of joists for each twenty-five feet or fractional part thereof measured in the direction of the length of joists."

This section is not limited to buildings within the fire limits, nor is it a part of the tenement house ordinance above referred to, and the term "lodging house", therefore, must be held to apply to all lodging houses in the City of Chicago within the usual and ordinary meaning of that term; and since, as has already been seen, the buildings in question are temporarily applied to a use different from that for which they were constructed and equipped, to-wit: for temporary use as lodging houses, compliance with this Section 151 is, in my opinion, an essential prerequisite to the lawful use of such buildings for such purpose.

Fourth. The provisions of Section 153 which I have above

quoted apply, in my opinion, as already stated, only to the packing houses of the Omaha Packing Company. The Building Commissioner reports that said buildings of the Omaha Packing Company do not contain the necessary amount of stairs required by said Section 153.

Taking into consideration, therefore, the provisions of Sections 65 and 153, and the fact that the buildings last above referred to are within the fire limits, I believe the point raised under Section 153 is tenable as to the buildings of the Omaha Packing Company, and untenable as to the other buildings outside of the fire limits.

It may be suggested that it is necessary to take into consideration existing conditions at the Stock Yards; that an industrial war is being waged between the packers and their former employes; that numerous instances have occurred in which acts of violence have been committed against the men and women who have been recently employed by the packers to take the places of the men and women who have left the packing houses on a strike; that these new employes are housed in the packing houses to secure their personal safety.

These considerations would be of controlling importance in the absence of express legislation prohibiting the use of such buildings for lodging house purposes. In the presence of express provisions of the law to the contrary, however, it is no more justifiable to permit the packers to break the law for the purpose of providing for the safety of their present employes, than it is to permit their former employes to break the law in their efforts to prevent the employment of men and women in the places formerly occupied by them. If either party to this industrial conflict cannot win without breaking the law, that party deserves to lose. The administrative officers of the municipal government can, in such a case, do nothing more and nothing less than to enforce the law against both contending parties, and let the results be what they may. The obvious answer to the suggestions above discussed is that if the law requires these persons to be housed outside of the packing houses, a commensurate duty rests upon the police force to see that these persons are protected from violence and personal injury.

I am, therefore, of the opinion that the use of each and all of said packing houses for temporary use as living quarters for men therein employed is unlawful, unless and until the owners of said buildings, respectively, have complied with the provisions of Sections 65, 151 and 153 as above construed; that is to say, those within the fire limits must comply with Sections 151 and 153, and those without the fire limits with Section 151.

The remaining question for consideration is as to the duty of the city officers in the premises.

I think that the packers should be notified of the provisions of the ordinances above quoted, and should be notified to forthwith discontinue the lodging of men in their packing houses. This is not, in my opinion, a case where it would be proper to permit this breach of the ordinance to continue during the time required to reconstruct the buildings so as to make them comply with the ordinances in the respects named, for two reasons; first, because it is obvious that the packers do not want to reconstruct their packing houses and convert them into lodging houses. So to do (for example, the construction of fire stops every twenty-five feet) would render them useless for packing house purposes; and second, because in this case the peculiar wording of the ordinance prohibits such a course. Section 65 *supra*, declares that such change of use is "unlawful . . . unless the requirements of this ordinance for such new and different use shall *first* have been complied with and a permit for such alteration of use shall have been *first* obtained from the Commissioner of Buildings." The completion of these changes are conditions precedent to the change of use.

I do not mean to say that the ordinances require the immediate use of the police force to expel the men from said buildings, provided the packers at once begin in good faith to remove the men from said buildings and to secure other safe places for their accommodation. A reasonable time, say three days, might properly be given for the procurement of new quarters and the transfer of men thereto, if the packers indicate their willingness to comply with the law and the work

of procuring new quarters and transferring the men is begun at once.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 22, 1904.

JOHN E. KEHOE, ESQ., Attorney and Counsellor at Law,
Ashland Block, Chicago.

Dear Sir:

I am in receipt of a communication from you presenting the claim of one Stephen Cunningham, a former member of the Chicago Fire Department, for salary for a period of twelve months succeeding his retiring upon July 1, 1903, from the fire department of this city.

You base your claim for the salary of Mr. Cunningham upon Section 631 of the Revised Code of 1897. The section in question I consider invalid from the fact that it is in conflict and must necessarily be superseded by the terms of the Firemen's Pension Act. Section 631, referred to, provides:

"DISABILITY—SALARY. Any member of the fire department receiving injury or becoming disabled while in the discharge of his duties, so as to prevent him from attending to his duties as such member, shall, for the space of twelve months, provided his disability shall last that time, receive his usual salary. The fact of such disability, and its duration, shall be certified by the city physician, or such other evidence as the fire marshal may require."

Both the Police and Firemen's Relief Fund Act and the Act for the Creation of a Board of Trustees of the Firemen's Fund and the Formation and Disbursement of the Fund have provision for the payment of pensions to disabled firemen.

Beyond these facts, the intention of Section 631 is plainly that any member of the fire department might receive a pension for a space of twelve months after becoming injured, providing he still remains a member of the fire department, and the section did not contemplate the payment to a former member who had severed his connection with the service. The intention evidently was that where a man was injured and

laid off, on account of such injury, temporarily, and the period of such lay off extended for a space of twelve months or more, but thereafter he returned to duty, the twelve months during which he had been laid up on account of disability should be paid for by his receiving his regular salary. I cannot possibly distort the section you refer to, even admitting its validity, into any construction as would warrant the payment to your client of his full salary for the twelve months after he had left the service of the city.

Referring to your proposition to submit the matter for a judicial determination to a judge of one of our courts, I am in hearty sympathy with such procedure as you suggest, and will be pleased to confer with you with reference to acting along these lines.

Yours respectfully, .

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

AUGUST 24, 1904.

W. H. MUSHAM, Fire Marshal.

Dear Sir:

I have a communication from you of recent date requesting the opinion of this department as to whether under the building ordinances relating to theaters you can report favorably upon theaters which now have stand-pipes of less than 2½ inches in diameter.

Under the building ordinance passed and amended in February there were no requirements as to the diameter of stand-pipes to be placed in buildings of Class V., namely, all buildings which are used as public theaters where an admission fee is charged and in which movable scenery is used. Under the old ordinance passed prior to the building ordinance of February, 1904, stand-pipes of a diameter of 2 inches were required in the case of buildings of Class V.

The ordinance of July 18, 1904, excludes from the operation of its provisions public houses and club houses with a

seating capacity of less than 600 although occasionally used for theatrical representations, and provides that such buildings shall not be construed to be public theaters although movable scenery may occasionally be used. Buildings covered by this exception, therefore, I do not discuss in this opinion, confining myself entirely to buildings which are properly Class V. buildings.

Section A 13 of the ordinance of July 18th, above referred to, provides that:

"A standpipe not less than two and one-half inches in diameter shall be installed on each side of the stage with a hose connection at the stage and each level above and below the stage and hose connected thereto with a hose valve. Such standpipes shall be connected with a tank on the roof containing not less than three thousand gallons of water, protected from frost, and also with a power pump, all of which shall be subject to the approval of the Fire Marshal. . . ."

This provision applies to theaters already in existence.

Section B 15 has reference to theaters hereafter to be erected and provides that:

"A standpipe not less than three (3) inches in diameter shall be installed on each side of the stage with a hose connection at the stage and each level above and below the stage and hose connection thereto with a hose valve. . . ."

I am, therefore, of the opinion that in old theaters which can properly be placed under the classification of Class V., the ordinance requires standpipes of $2\frac{1}{2}$ inches in diameter, and that upon no building of Class V. having standpipes of less than $2\frac{1}{2}$ inches in diameter should you issue a favorable report.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 25, 1904.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

In reply to your favor of the 15th ult., asking for an opinion as to what authority you have over the sale of improvements which are condemned in the opening of streets and alleys, and "who should attend to the sale of the improvements and what disposition should be made of the moneys received from the sale," I beg leave to say: That I am of the opinion that the Board of Local Improvements has full and complete authority in respect to the removal and sale of such improvements.

By Sections 12 and 13 of the Local Improvement Act a municipality has authority to make improvements to be paid for wholly or in part by special assessments which will require that private property will be taken or damaged for public use; and by Section 83 of said act the Board of Local Improvements is authorized in the matter of special assessments to make "or cause to be made, written contracts and receive all bonds authorized by this act, and to do any other act, express or implied," for which the ordinance for the improvement provides. Under these statutes I am of the opinion that the board possesses full authority to arrange for the sale of said improvements.

In regard to the disposition of the moneys received from the sale of such improvement, I am of the opinion that they should be turned into the special fund for said improvement, since the value of the improvements is one of the items of the assessment apportioned among the respective property owners, and therefore whatever money can be realized by the sale of the improvements by the board should be, on principle, put in the special fund to assist in defraying the cost of the work, or, if not required for that purpose, then to be rebated to the property owners.

Very respectfully,

FRANK JOHNSTON JR.,

Assistant Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

AUGUST 26, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your favor of August 9, 1904, transmitting communication from the Commissioner of Public Works in regard to the laying of water mains in Austin where streets are about to be improved, has been referred to me for reply.

The Commissioner of Public Works seems to be under the impression that water mains cannot be laid on streets where they will not produce an annual revenue of ten cents per lineal foot, unless (1) the property owners will deposit the cost thereof, or, (2) a special assessment is levied for the cost. In my judgment, this position is somewhat erroneous. The conditions mentioned apply only in cases where the private individual wishes to have mains laid in streets where such mains will not produce the required revenue. The City Council, however, may order mains to be laid in any street, and the requirement as to the production of revenue does not apply in such cases. You state that:

“Mr. Blocki's point is that under the ordinance the small mains will not pay the annual revenue of ten cents per lineal foot because of the fact that the city has no big main in this territory, and that, therefore, it will be illegal for the department to lay the small main. My point is that because of the appropriation having been made for the big main and because the work of laying it is in progress, it can be looked upon as practically an accomplished fact, and that, therefore, these smaller mains by the time they are laid will be sufficiently lucrative to justify their laying under the city ordinance.”

I think your position on this point is correct; however, I think the whole question is disposed of in view of the fact that the City Council at its meeting on August 24th passed an order for the laying of these mains. As above suggested, the City Council may order the laying of mains re-

gardless of the amount of revenue that will be produced by them when laid.

Yours very respectfully,
 WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved.

WM. D. BARGE,
Acting Corporation Counsel.

SEPTEMBER 1, 1904.

ARTHUR R. REYNOLDS, M. D., Commissioner of Health.

Dear Sir:

I have a communication from you of the 31st ult., requesting the opinion of this department as to your authority to issue a license to an applicant desiring to start a slaughtering and rendering plant in a location outside of what is known as the rendering district.

It is not necessary for the consideration of the present question to enter into a discussion as to the validity of the present rendering ordinance in so far as it attempts to create a rendering district. Under Section 1057 of the Revised Code of Chicago of 1897, it is provided that:

“Neither the business of slaughtering cattle, nor the keeping of any slaughter house, nor the yarding of cattle, shall be begun or undertaken at any new additional place within the City of Chicago, except pursuant to a permit from the City Council; nor shall any person or corporation keep any slaughter house or yard, or any cattle therein hereafter without a permit from said council.”

It is obvious that under the section above quoted the plant in question cannot be located and maintained at the location mentioned without the legislative action of the City Council, and in the absence of such action, I am of the opinion that you are without power to grant this license.

Yours respectfully,
 JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

SEPTEMBER 6, 1904.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

Your favor of September 1, 1904, addressed to Mr. Sexton, has been referred to me for reply. You state that Mr. Otto Young, of "The Fair", on August 9, 1890, secured a permit for the erection of a building sixteen stories high, but that he only built nine stories; that he now wishes to build two additional stories, and you wish to know whether it is necessary for him to obtain a new permit or whether the old permit is still in force.

Replying thereto, I beg to say that the ordinance in force at the time the above permit was issued, as found in E. B. Myers & Co.'s 1890 edition of the laws and ordinances of Chicago, is as follows:

"1620. BUILDING PERMIT—SPECIFICATIONS AND PLANS. Sec. 1103. Before the erection, construction or material alteration of any building in the City of Chicago, the owners, architect or builder, shall submit to the Commissioner of Buildings full specifications and plans of the proposed construction or alteration, and a detailed statement in writing; such statement shall give: 1st. The location of the proposed work. 2d. General dimensions, number and height of stories. 3d. Dimensions of joists and timbers, and distance apart. 4th. Dimensions of supporting iron work. 5th. For what purpose the building is designed. The owner, his agent or architect, shall then sign an agreement that he will construct the work in accordance with the description as set forth in such specifications, plans or detailed statement, and all matters and things connected with such construction or alteration of any building shall be done in strict compliance with the building ordinance. Thereupon the Commissioner of Buildings shall issue a permit to make such construction or alteration, upon the payment of the fees and water tax hereinafter mentioned in this article; and it shall not be lawful to proceed to construct or materially alter any building without such permit."

It will be observed that that ordinance required that full plans and specifications of the proposed building together with

various particulars should be submitted to the Commissioner of Buildings before a permit could be issued. The building ordinances in force at the present time also require that plans and specifications shall be submitted before a permit shall be issued. Since 1890 there have been many and important changes in the building ordinances, and it is altogether likely that a construction which would have been permissible under the ordinances in force at that time would not be permitted now. I am, moreover, of the opinion that when the Fair building was completed, even though it had not been built to the height originally contemplated, the permit in question thereupon became *functus officio* and of no further effect. Were this not so, a man might take out a permit for a sixteen story building and build one story every five years, thus prolonging operations for a period of eighty years. To contend that such a result might follow the issuance of a building permit would be manifestly absurd.

For the reasons above stated I am of the opinion that the permit in question is no longer in force, and that a new permit will be necessary before the additional stories can be constructed.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

SEPTEMBER 15, 1904.

MR. L. E. GOSSELIN, Auditor.

Dear Sir:

Your letter of April 17th, enclosing form of bond, and asking this department to prepare a form of official bond to be executed by all officers of the city and such employes thereof as are required to furnish a bond, was received in due course.

The terms and conditions of the bonds of all officers of the city are fixed by statute. Section 4 of Article VI of the Cities and Villages Act provides in part as follows:

“All officers of any city or village, whether elected or

appointed, shall, before entering upon the duties of their respective offices, take and subscribe the following oath or affirmation: . . . And all such officers . . . shall . . . execute a bond with security . . . conditioned for the faithful performance of the duties of the office and the payment of all moneys received by such officer, according to law and the ordinances of said city or village."

Section 1330 of Chapter 43 of the Revised Code of Chicago, provides as follows:

"The bonds of all officers shall be executed with two or more sureties, conditioned as provided in this article and Section 4 of Article VI of 'An Act to provide for the incorporation of cities and villages,' adopted by the City of Chicago, April 23, 1875."

Some of the ordinances provide that certain employes shall furnish a bond, and also prescribe the terms and conditions thereof; while others do not. However, the form of bond which you attach to your letter and which you say is now in use, is sufficiently comprehensive, in my opinion, to cover both officers and employes. The express provisions of the statute and ordinances as to terms and conditions are complied with in this form.

I would suggest, however, that the word "elected" in the fifth line of the third paragraph of the attached form of bond, be stricken out and a blank line substituted. Where the position is an appointive one, the word "appointed" should be used instead of the word "elected", and vice versa.

Answering your verbal inquiry as to whether the sureties on such bonds are required to file a schedule of their property, I beg to advise you that they are not required to do so.

Answering your remaining inquiry as to whether a bond given by an officer or employe elected or appointed for a certain term, is sufficient security for the city, if such officer or employe is elected or appointed for another or successive term, I beg leave to advise you that it is not sufficient. The person is elected or appointed for a fixed term, and the bond is limited to that period. (Meehem on Public Officers, Sec. 286.)

The form of acknowledgment of the bond is in accordance with the provisions of Section 1333 of the Revised Code; and

the form of justification for sureties is in accordance with Section 1331 of the Revised Code.

Yours respectfully,

MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

SEPTEMBER 19, 1904.

L. E. STANHOPE, Esq., Acting Commissioner of Buildings.

Dear Sir:

I have your letter of the 15th inst., requesting my opinion as to the interpretation of the following section of the building ordinance:

“Class IV. Definition of. Buildings of Class IV. shall include all buildings used as assembly halls for large gatherings of people, whether for purposes of worship, instruction or entertainment, except buildings used as public theaters where an admission fee is charged, and in which movable scenery is used.”

You state there is a doubt in your mind as to whether the words “large gatherings” would permit you to apply the provisions of the ordinance to small halls or churches seating from fifty to one hundred persons, and ask as to when a “gathering” ceases to be a “large gathering” and become a gathering not included under the provisions of the ordinance.

A building receives its characterization as a building of Class IV. if it contains “assembly halls for large gatherings of people, whether for purposes of worship, instruction or entertainment, . . .” and in my opinion it is the “assembly hall” which really gives it the characterization, the words following being merely further description. The Century Dictionary defines the word “hall” as being “a room or building devoted to public business or entertainment, or to meetings of public or corporate bodies as a town hall; an assembly hall; a music hall,” and also defines the word “assembly” as “a company of persons gathered together in the same place and usually for the same purpose whether religious, political, edu-

cational or social." The two words used together have a well known meaning, and in my opinion a building containing a room or rooms used as or devoted to the purposes of "assembly halls" is a building of Class IV. as defined by the ordinance. It could not be reasonably contended that the classification would depend upon the size of the gathering. A room of a capacity to contain but ten persons could not possibly be said to be an "assembly hall." A reasonable application of the term "assembly hall" would determine the character of the building.

Very truly yours,

WM. H. SEXTON,
Acting Corporation Counsel.

SEPTEMBER 23, 1904.

ARTHUR J. EDDY, Esq., President, Board of Trustees, Police Pension Fund, Chicago.

Dear Sir:

I have a communication from you of recent date, requesting the opinion of this department as to whether the so-called redemption fee of not less than \$3.50 in each instance, which it is necessary for the owner of a dog to pay in order to secure its release from the dog pound, should properly go to the city or to the fund over which your board has control.

The present pension "Act for the Formation and Disbursement of the Police Pension Fund", passed May 16, 1903, enumerating the sources from which the pension boards in each city derive their funds,^o provides, *inter alia*, that the following moneys shall constitute a police pension fund: "First. Three-fourths of all moneys received for taxes or for licenses upon dogs." Chapter XXI. of the Revised Code of Chicago of 1897, Section 548, reads as follows:

"*License fee.* Every owner of, or person who harbors or keeps a dog within the limits of this city, shall report to the City Collector annually, within thirty days after the first day of May in each year, his or her name and address, and shall give the name, breed, color and sex of each and every dog owned or kept by such person, and shall pay to such officer the sum of two dollars for each and every dog, and cause such

dog, or dogs, to be registered for license in the office of the City Clerk, who shall furnish the owner or keeper of the same with a license tag."

Section 552 of the same chapter, provides for the impounding of any dog found running at large in the City of Chicago contrary to the ordinance provisions or any order issued by the Mayor. Section 554, as amended July 14, 1904, provides:

"For every dog taken up and confined in the dog pound, as provided in this ordinance, a redemption fee of three dollars, together with the amount of the unpaid license tax, if any, shall be paid to the City Collector for the use of the city; and upon procuring the certificate of the City Collector stating that said amount has been paid, and paying to the poundmaster for taking up such dog the further sum of fifty cents, and the cost of keeping such dog, not to exceed twenty-five cents per day, and cost of advertising, if any, as hereinafter provided, the owner or keeper thereof, within five days after the impounding, or any other person, after five days, shall be entitled to redeem such dog, and if such dog shall not be redeemed within five days after being taken up, such dog shall be destroyed by the pound keeper, except that at the expiration of the five days allowed for the redemption of impounded dogs, the poundmaster shall advertise immediately in a daily newspaper of general circulation in this city, all unredeemed unlicensed dogs, if known or identified as such, and if such dogs be not redeemed at the expiration of the fifth day after such advertising, they shall then be destroyed."

It will thus be seen that the expense to the delinquent dog owner for redeeming his dog is divided up as follows:

In cases where the dog is impounded for not having a license, or other cause, first, a redemption fee of \$3.00, which the ordinance provides should be paid to the City Collector for the use of the city; second, a fee for the poundmaster for taking up the dog, of fifty cents; third, the cost of keeping the dog while impounded, not to exceed twenty-five cents per day; fourth, the cost of advertising, if any; fifth, the amount of the dog tax or license, namely, \$2.00. Concerning the fifth item, the license fee of \$2.00, there can be no question but that

your fund is entitled to this amount. Concerning all other amounts above mentioned, it now appears that the Comptroller takes the position that all of the moneys over the \$2.00 license, should be paid to the city and not to your fund.

Taking up these different fees seriatim, it appears to me that the redemption fee, the poundmaster's fee and the cost of keeping the dog, are all moneys which go towards the maintenance of the dog pound and the system of enforcing the collection of the license fee; in other words, that they are necessary municipal expenses towards compelling an owner to license his dog. In the enforcement of a proper municipal regulation, the city is obliged to expend a large sum of money in the machinery, so to speak, of the enforcement of the license provision, and I am inclined to think that all fees and charges over the license fee of \$2.00 are merely refunding to the city the money which it has been compelled to expend in obtaining the license fee for each dog. Even if it is reimbursed to this extent, the city still is put to the expense of the issuance and registration of the license, and providing the tag required by the ordinance, for which it receives no fee, as the total amount collected goes to your fund. To hold that in addition the city should pay to the Police Pension Fund the amount which it expends towards compelling owners to increase your fund by paying their dog licenses, I think would be contrary to the spirit both of the act and the ordinance.

I still admit that the matter is not free from doubt, but cannot quite bring myself to the conclusion that the fees can properly be called a license which in legal effect is a right granted by competent authority to do an act which without such authority would be illegal; nor do these fees constitute a tax, which are burdens or charges imposed by law upon persons or property for public purposes or to accomplish some governmental end.

In conclusion, I think that to all of these fees above the

amount of the regular license fee of \$2.00, the City of Chicago is entitled rather than the Pension Fund.

Very respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

SEPTEMBER 28, 1904.

MILTON J. FOREMAN, Esq., Chairman Committee on Local
Transportation.

Dear Sir:

I have received a copy of the order of your committee directing a conference between yourself and this department in regard to the necessary steps to be taken for the vacation of the Washington street and the La Salle street tunnels preparatory to their removal as obstructions to commerce, in accordance with the Act of Congress approved April 27th, 1904.

Since our extended conference of last week I have given the matter very careful consideration, and beg leave to inform you and your honorable committee of the conclusion which I have reached in the matter.

Notwithstanding the fact that by ordinance of the City Council permission and authority were given to certain street railway companies to occupy and use said tunnels for a period of time which has not yet expired, I have no doubt that by these ordinances the companies received no greater authority than the city possessed.

The rights of the city with regard to the Chicago River are subordinate to the paramount control of the Federal Government, and the companies therefore took their title to the use of these tunnels subject to the paramount right of the general government to terminate such use if its continued enjoyment became an obstruction to interstate commerce and to the free and uninterrupted navigation of the river. This is the view taken not only by the law officers of the general government in their opinions delivered to Congress while this

matter was under consideration, but is in entire harmony with the decisions of our own Appellate and Supreme Courts. (*People ex rel. City of Chicago v. West Chicago Street Railroad Company*, 203 Ill., 551; *People ex rel. City of Chicago v. West Chicago Street Railroad Company*, No. 10,666, opinion rendered July 14th, 1904.)

In the cases above referred to, the right of the city to compel the occupants of the Van Buren street tunnel to lower said tunnel at their own expense was sustained. The right of the city to compel the companies to vacate the Washington street and the La Salle street tunnels is certainly much less free from doubt.

I am informed that there is no salvage in the present tunnels, and that the present structures cannot be advantageously utilized in the construction of lower tunnels in their place. If this is so, the question presented in the case of the Van Buren street tunnel of compelling the companies to lower the tunnel at their own expense is not here presented, and the simple question arises as to what should be done preparatory to the destruction of said tunnels and the removal thereof as obstructions to navigation.

Due notice has already been served upon the occupants of said tunnels of the intention of the city to remove the same, by your letter to them, of recent date, in which you invite them to confer with your committee in regard to the re-routing of their lines on account of the destruction of said tunnels. At this point, and in answer to your verbal inquiry, I beg leave to say that in my opinion, if the companies refuse to accept any reasonable plan for re-routing their cars, tendered them by your committee or the City Council, the city has, under its police power, the right to compel the operation of cars over such new routes. They cannot, on account of the action of the Federal Government, refuse to perform their public duty of transporting passengers across the river and into the business center, if reasonable methods are tendered by the city authorities for that purpose. This duty could be summarily enforced by mandamus.

I am of the opinion, therefore, that the proper course to pursue is to pass an ordinance reciting the facts and circum-

stances and directing the companies to vacate said tunnels by a certain date and directing the Commissioner of Public Works to take steps to remove said tunnels as obstacles to navigation in the channel of the river. A copy of this ordinance when passed should be delivered to the occupants of said tunnels, and upon the day stated the city should use its police power if necessary to prevent their further use. The method of the removal of said tunnels should be determined in a general way by your committee.

In view of the fact that the companies are, by the action of the Federal Government, deprived of the use of these tunnels for a portion of the term mentioned in the ordinance above referred to, it would, I think, be proper in the circumstances for the Council to give the companies the privilege of using the bridges across the Chicago River as a substitute for said tunnels. In the case of the La Salle street tunnel the companies expended large sums of money in the construction of the Clark and Wells street bridges as the consideration of the grant. There is, moreover, an obligation resting on the city to see that the people are transported from the north and west divisions of the city to the business center, and on this account such arrangements should be made as will best accommodate the demands and necessities of the traveling public. If the installation and operation of overhead electric trolleys are thus permitted, they should not be extended beyond what is necessary, taking into account the public requirements, and care should be taken that the trolley privileges thus given should not amount to a surrender of or in any way affect the city's rights in the controversy which has been for many years at issue between the city and the companies in regard to the use of overhead electric wires in the business center. This privilege should be given for a period of time equal to the period in the tunnel ordinances, and should be subject to earlier termination at the will of the city if tunnels are constructed in lieu of those destroyed or if tunnels are constructed under the river as a part of a general subway system.

I submit herewith form of ordinance which in my opinion will carry out the views above expressed.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

SEPTEMBER 29, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I received from you to-day a report from the engineering department on the construction of piers, each extending about sixty feet into the water of Lake Michigan, from the water's edge, at intervals of about 100 to 150 feet, for about 1,800 or 2,000 feet north of the premises occupied by the Saddle and Cycle Club at Balmoral avenue and lying east of Sheridan road, which were constructed without a permit and in violation of law. The letter contains the recommendation that said piers be ordered removed and the persons constructing the same subjected to the penalties of law.

The question to be considered is the authority of the city in the premises. I find that the Board of Commissioners of Lincoln Park were, by an act of the Legislature of June 15th, 1895, given authority to enlarge the park, and were granted for park purposes the submerged land in Lake Michigan as far out as navigable water; that pursuant to the provisions of the act, the Commissioners of Lincoln Park prepared and adopted a plan for the occupation and improvement of the submerged lands lying between the north line of Grace street extended and the northern limit of the town of Lake View; that by the terms of said act and the action of the Park Commissioners in pursuance thereof, "all the submerged land between the limits of said proposed improvements became and was vested" in the Commissioners of Lincoln Park on November 25th, 1895.

The Supreme Court of Illinois, in the case of *Gordon v. Winston et al.*, 181 Ill., 338, which was a proceeding for injunction, instituted by the Lincoln Park Commissioners against Charles U. Gordon, to enjoin him from constructing piers upon the submerged lands along the shore of Lake Michigan, held that:

"Under the act in question, the Park Board had the right

to appropriate the submerged lands extending out to the line of navigation, and no contention is made that they exceeded that limit. The submerged land upon which the piers were located was the property of the State, granted to appellees in trust for park purposes, and it is clear they had the right to enjoin any acts on the part of appellant which tended to encroach upon the public domain and gradually appropriate such property to his own use. It will be sufficient to say that the material questions involved in this case have been settled by the decision in *Revell v. People*, 177 Ill., 468."

In *Cobb v. Commissioners of Lincoln Park*, 202 Ill., 427, which was a bill for an injunction to restrain the park authorities from interfering with the complainant in the construction of a wharf into the waters of Lake Michigan to the point of navigability, from his property abutting on the shore of Lake Michigan, under a permit from the Secretary of War of the United States, the court held that the title to the submerged lands of Lake Michigan, being in the State, it was within the power of the Legislature to pass the act of 1895 (Laws of 1895, page 282,) granting certain submerged lands to the Commissioners of Lincoln Park for specified purposes.

The control of said submerged lands having been thus conferred upon the Board of Commissioners of Lincoln Park, it is the duty of that municipality to so defend the shore line that the title of its grantor, the State of Illinois, will not be lost or subject to dispute in the future by the construction of piers projecting into the lake by private property owners and thus resulting in the making of land. It is evident from the facts that have been recently brought to light that piers have been constructed without authority from the State. The Commissioners of Lincoln Park cannot authorize the construction of piers of this character, as their interest is only for the reclaiming of submerged lands for park purposes. If, therefore, the Commissioners of Lincoln Park do not guard the shore line from the construction of piers of this character projecting into the waters of Lake Michigan, and if steps are not taken by them to cause the piers, which have been constructed without authority from the State, to be removed, the City of Chicago, as the agent of the People of the State of

Illinois, ought to guard against these encroachments and ought to take steps to cause the removal of these piers if no authority can be shown from the State for their construction.

I suggest that you communicate with the Commissioners of Lincoln Park on the subject matter, with the sole purpose of conserving for the People of the State of Illinois the submerged lands in Lake Michigan, which might be lost to them unless the said Commissioners use diligence, or unless there is joint action by them and the city. I am of the opinion that at the present time the situation does not call for any action by you, as the submerged land is in the control of the Board of Commissioners of Lincoln Park, by authority of said act of 1895, and the subsequent action of said board.

I return herewith the report of the engineering department and plat attached thereto,

Very respectfully,

WM. H. SEXTON,
Acting Corporation Counsel.

OCTOBER 6, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Under date of September 19th, 1904, you addressed a communication to this department inquiring whether or not "In figuring the revenue derived from water mains laid under special assessment or by special deposit the frontages of school buildings or other public, etc., properties that use water but are not charged for same by reason of the city water ordinances should be figured in estimating the amount of money that is derived per lineal foot from said mains."

In reply I beg to say that there is no general provision in the code for laying water mains by "special deposit", and none under which persons who have paid special assessments for the laying of water mains shall be reimbursed when the mains shall produce a given revenue. In nearly every case where water mains have been laid it has been done in pursuance of a special order or ordinance of the City Council. The expression usually employed in these orders and ordinances to denote the income derived from water mains is "rev-

enue." In the refunding ordinance of January 4th, 1904, it is provided that no certificate shall be taken up unless the pipe for whose laying it was issued shall be paying an annual "revenue" of ten cents per lineal foot. The question which you have asked cannot be said to be a question of law, but is to be determined rather by what the City Council intended in the matter. In the absence of any other information as to the intention of the Council, we must look to the meaning of the language employed to determine what they intended.

Webster's International Dictionary defines the word "revenue" as follows:

"That which returns, or comes back, from an investment; the annual rents, profits, interest, or issues of any species of property, real or personal; income."

"The annual yield of taxes, excise, customs, duties, rents, etc., which a nation, State or municipality collects and receives, into the treasury for public use."

The definition given in Bouvier's Law Dictionary is:

"The income of the government arising from taxation, duties and the like; and, according to some correct lawyers, under the idea of revenue is also included the proceeds of the sale of stocks, lands and other property by the government."

From these definitions one is forced to the conclusion that the word "revenue" indicates money received into the public treasury, and it must be presumed that the council so used the term. While there is some force in the contention that it would be equitable to include the frontages of school buildings and other public buildings in computing the earnings of a given water main, still, I think that in the strict meaning of the word "revenue" it can hardly be said that such buildings, when furnished water free of charge, are producing any revenue to the city.

I am therefore of the opinion that your inquiry should be answered in the negative.

Yours respectfully,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 14, 1904.

MR. E. M. LAHIFF, City Collector.

Dear Sir:

I am in receipt of a communication from you of recent date requesting an opinion of this department as to whether a saloon license heretofore issued to one Anderson, at number 614 California avenue, can be changed so as to permit a transfer of the location of the saloon to number 3139 Milwaukee avenue.

The question involved in your communication may be briefly stated as follows: Can a dram shop license to A to keep a saloon at one location be transferred so as to cover the maintenance by the same person of a saloon at a different location?

Two considerations, doubtless, influence the mind of the licensing officer in determining whether a license can properly be granted to an applicant to keep a dram shop at the place designated in the application. The first would naturally be the character of the applicant, his standing in the community and his fitness for the personal trust imposed upon him by the issuance of the license. The second consideration would be whether at the place designated, the maintenance of a dram shop would be fit and proper.

It appears to me that the second consideration would be of no less weight with the executive than the former. In cases of recent occurrence, licenses have been issued to applicants who formerly obtained licenses and suffered them to be revoked. It was desired by these applicants to start dram shops in different locations from those in which they had been doing business when their licenses had been revoked. The case particularly in my mind is that of one Friederick, whose license had been revoked heretofore for violation of the wine room ordinance, and who applied for a license to keep a dram shop, at a new location, after the expiration of more than a year from the revocation. It was thought, and properly so, that the man's previous conduct at a certain location would not necessarily be an infallible index as to what his conduct might be in an entirely different location and under different circumstances and environment.

Following this line of reasoning, it appears to me that the location of a saloon is of the greatest importance in determining whether or not the license may be issued to an applicant; and a license having been issued to an applicant to keep a saloon at one location, the same license cannot be so transferred as to cover the maintenance of a saloon at an entirely different location, but that if the license to conduct the dram shop at another location is sought, an entirely new application must be made and a new license issued in conformity therewith.

I am therefore of the opinion that a change of location cannot be permitted by you under this license, but that the applicant must obtain a new license from the city to carry on his business at the new location.

Though perhaps beyond the scope of your present inquiry, it may anticipate further question upon this subject to say that before the issuance of a new license as indicated above, another license fee would have to be paid by the applicant and you could not apply any unused portion of the original license fee as a rebate upon the new license.

Very respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 14, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I acknowledge receipt of your letter of the 10th inst., enclosing letter from Messrs. Marston & Tuttle, asking for a construction of the bond provision of the ordinance concerning the use of space under sidewalks, passed July 14, 1904 (page 1054 of Council Proceedings).

Two inquiries are propounded in said letter: (a) Whether, in the event of the sale of the property for which such bond has been given, the bond can be surrendered or can-

celed and a new bond taken from the purchaser; (b) whether a new permit will be issued to such purchaser.

The said ordinance contains the following language:

"Such bond shall be conditioned that the person, firm or corporation to whom such permit shall be issued, his heirs, successors or assigns, or its successors or assigns, as the case may be, will save and keep the city free and harmless from any and all loss or damage or claim of damage arising from or out of the construction, use or maintenance of such structure, or of the space therein and for the maintenance of the street, alley or other public way, or the sidewalk over such space . . . and for the full and complete protection of the city against any litigation growing out of the granting of such permit or anything done under such permit, and for the prompt and full payment of the compensation hereunder required and for faithful performance and observance of the terms and conditions of this ordinance."

It will be observed that the ordinance requires the giving in the first instance of a bond conditioned not only that the applicant, but "his heirs, successors or assigns, or its successors or assigns, as the case may be, will save and keep the city free and harmless," etc. In view of this language, I am of the opinion that the bond given by the applicant cannot be surrendered or canceled upon the delivery of a new bond by a subsequent purchaser.

I think that the committee on compensation should be invited to consider whether or not an amendment to this ordinance should be presented to the City Council, making the applicant liable only for his own acts, and not those of his successors or assigns, and specifically providing for a new bond to be filed by the purchaser, and that upon the filing of an application by the purchaser for permission to use the space under the sidewalks, and the filing of a sufficient bond by him, the former bond stands only as security for liabilities arising prior thereto.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 18, 1904.

TO THE HONORABLE, THE COMMITTEE ON LOCAL TRANSPORTATION, OF THE CITY COUNCIL.

Gentlemen:

We have considered your inquiries in respect to the communication of Mr. John M. Roach, General Manager for the receivers of the Chicago Union Traction Company touching the removal of the La Salle street and the Washington street tunnels, presented to your committee on the first instant, and have reached these conclusions:

First. The engineering questions raised in said communication are, of course, outside our province and need not be here discussed.

Second. Upon these engineering questions, however, is based a plea for the abandonment of existing cables and the substitution therefor of overhead electric equipment. We are clearly of opinion that, under existing laws and ordinances, the companies are without authority to make the desired substitution of trolley for cable power. In view of the petition, filed by the receivers in the United States Court in November, 1903, in which they set forth the claims of the companies in respect to this matter making no suggestion of a right to make such substitution, the statement by Mr. Roach, to the effect that he is advised by counsel to the receivers that he now suggests nothing to which the companies are not entitled "under the circumstances and existing law and ordinances," is not entitled to any serious consideration. Neither in the petition nor in the argument before Judge Grosseup was any claim made on behalf of the companies of the right to substitute electric for cable power. On the contrary, it was insisted that the changes then desired were permissible because they would not amount to such substitution.

We are also clearly of opinion that the action of Congress requiring the removal of the tunnels confers no additional powers upon the companies. The additional powers which they desire can only be obtained by action of the City Council of the City of Chicago. The argument that the proposed substitution of electric for cable power is desired to enable the receivers to perform their duty to the public is an

attempt to take advantage of a supposed emergency to cure one of the most serious defects in their alleged existing rights. It is a reappearance of the same argument from public convenience and corporate duty, which was urged by the receivers in the pending litigation in support of their "twig and branch theory" and repudiated by the court.

The city should not, in our judgment, under any circumstances, permit the abandonment of cable power save in connection with, and as a part of, the final settlement of all existing controversies between the city and the companies. To yield this point would arm the companies for the continuation of the present litigation and for the indefinite postponement of a final solution of the whole problem.

Third. Since the matter was last considered by your committee, the situation has materially changed. On Monday, the 3d instant, the city received a communication from the Secretary of War fixing April 15, 1906, for the removal of the tunnels in pursuance of the recent Act of Congress directing their removal. This communication postpones for more than one year the time recommended by Col. O. H. Ernst, of the Corps of Engineers, U. S. A. This postponement, as is well known, was not made at the solicitation of the city. At the hearing before Col. Ernst, the city's representatives expressed its willingness to co-operate with the government in the removal of the tunnels, leaving the fixing of the time to the judgment of the Federal authorities.

While we are of the opinion that the street railway companies acquired the right to use the Washington street and La Salle street tunnels, subject to the paramount authority of the Federal government, and when required by the Federal government the city may remove them as obstacles to navigation without incurring any financial liability to the companies, a different question would arise if the city should undertake their removal before the expiration of its contracts with the companies and before being required to do so by the Federal government. We understand that the notice recently sent by your committee to the receivers, directing the vacation of the tunnels by January 1, 1905, was based on the necessary assumption that the recommendation of Col. Ernst fixing the

date for the vacation on April 1, 1905, might be approved by the Secretary of War. We think, in view of the postponement to April 15, 1906, that said notice should be withdrawn. With the passing of the supposed emergency, which led to the notice, the reason for it fails.

It should be noted that the ordinance rights of the Chicago Passenger Railway Company in the Washington street tunnel will expire on February 1, 1906; and that the ordinance rights of the North Chicago Street Railroad Company in the La Salle street tunnel will expire on July 19, 1906. Thus the date fixed by the Secretary of War, April 15, 1906, for the removal of the tunnels, is about three months after the ordinance rights of the Chicago Passenger Railway Company in the Washington street tunnel expire and about three months prior to the expiration of the ordinance rights of the North Chicago Street Railroad Company in the La Salle street tunnel. If it be impossible to arrange with the companies for an abandonment of the tunnels at dates earlier than those upon which their contracts with the city will terminate and also in advance of the date fixed by the Secretary of War, upon terms not prejudicial to the rights of the city, we are of the opinion that the only safe course for the city to pursue is to maintain the present status until the expiration of its present contracts or until necessary to comply with the direction of the Secretary of War. As above stated, to authorize the companies to abandon their cables at this time would seriously if not irreparably prejudice the rights and legal position of the city in the existing controversies.

Respectfully submitted,

EDGAR B. TOLMAN,
Corporation Counsel.

EDWIN BURRITT SMITH,
JOHN C. MATHIS,
Special Counsel.

OCTOBER 22, 1904.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

I acknowledge the receipt from your office of a copy of

an order of the City Council passed at its last meeting, October 17, 1904, reading as follows:

"ORDERED, That the Comptroller be and he is hereby authorized to charge the cost of all permanent improvements, including the cost of intercepting sewers and the cost of public benefits and all expenses of the Board of Local Improvements to the Permanent Improvement Bond account."

In answer to your request for advice as to the legality of this order, I beg leave to say:

The ordinance of the City Council passed July 18, 1904 (Council Proceedings, pages 1098-1102), provides in part as follows:

"Section 5. That said bonds shall be delivered by the City Comptroller of said city to the purchaser or purchasers of the same, and the proceeds derived therefrom shall be used solely for the purpose of making permanent municipal improvements in said city and paying that portion of the cost of public local improvements therein for which said city as a whole is chargeable."

It is therefore proper for the Comptroller, either with or without the order above quoted to devote the proceeds derived from the sale of said bonds to the cost of "all permanent improvements, including the cost of intercepting sewers."

No one can doubt that the intercepting sewers are "permanent municipal improvements."

Nor have I any doubt of your right, under said ordinance, and with or without said order, to charge to said "permanent improvement bond account" the amount used in paying "public benefits" judgments, such use of the proceeds of said bonds being particularly authorized by the words in said ordinance "that portion of the cost of public local improvements therein for which said city as a whole is chargeable."

With regard to the legality of that part of said order which authorizes you to charge to said bond account "all expenses of the Board of Local Improvements," I entertain grave doubt. The Local Improvements Act of 1897 made a radical change in the system of paying for the expenses of superintending and administering upon special assessment

improvements. It created a new department of the municipal machinery. These expenses were formerly charged to the property owners as costs of the special assessment proceedings. I believe that the purpose of the act evidenced a legislative intent to eliminate these administration expenses from the cost of the improvement, and to make them a part of the current expenses of the municipality. I do not believe that they can be safely said to come within the words "that portion of the cost of public local improvements therein for which said city as a whole is chargeable." I have not failed to take into consideration the force of the argument that, since what the Board of Local Improvements does is confined to the superintendence of and administration upon "public local improvements", the expenses of said board may be considered as a portion of the cost of such "public local improvements"; but it should also be remembered that the board has the duty of passing upon the advisability of all local improvement schemes submitted by the City Council or the property owners, and that it may, and frequently does, expend large sums of money in estimating the cost of such improvements as a necessary prerequisite to the determination of the question of whether or not said improvements shall be made, and that frequently after expending large sums of money for that purpose, the board determines adversely to the making of the proposed improvement. Sums of money thus paid could not be said to be "the cost of public local improvements", and since it is now impossible to determine what portion of the expenses of the board is thus expended and what portion is expended in the actual making of the improvements, I am of the opinion that the expenses of the Board of Local Improvements cannot be charged against the "permanent improvement bond account", and that the last clause of the order under consideration is illegal.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 22, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your letter of October 17, 1904, in which you state that you have always understood it to be the duty of the City Council to determine the question of whether or not gates and flagmen shall be required at railroad crossings, but that you have recently been told that a statutory duty is imposed upon the Mayor and Commissioner of Public Works in this respect, I beg leave to say:

There is no statutory requirement placing upon the Mayor and the Commissioner of Public Works, or either of them, the duty to pass upon the above question.

Section 8 of an act entitled "An Act in relation to fencing and operating railroads", in force July 1, 1874, reads as follows:

"Hereafter, at all of the railroad crossings of highways and streets in this State, the several railroad corporations in this State shall construct and maintain such crossings, and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property."

Section 9 of said act provides as follows:

"Whenever any railroad corporation shall neglect to construct and maintain any of its crossings and approaches, as provided in Section 8 of this act, it shall be the duty of the proper public authorities, having the charge of such highways or streets, to notify, in writing, the nearest agent of said railroad corporation of the condition of said crossing or approaches, and direct the same to be constructed, altered or repaired in such manner as they shall deem necessary for the safety of persons and property."

I have no doubt that the meaning of the words "the proper public authorities", in the statute above quoted, is, in Chicago, the City Council.

Section 1 of Article V of the Cities and Villages Act provides:

"The City Council in cities . . . shall have the following powers: . . .

“*Twenty-seventh.* To require railroad companies to keep flagmen at railroad crossings of streets, and to provide protection against injuries to persons and property in the use of such railroads . . .”

The effect of these provisions of the Cities and Villages Act is to delegate to the City Council the authority over the whole subject matter of railroad crossings and provisions for safety at such crossings.

So far, therefore,°as the statutory provisions are concerned, the duty and the power are by them conferred upon and vested in the City Council.

Our Supreme Court has declared that, although the power was thus conferred upon cities and villages, *such power might not be exercised except by the passage of appropriate ordinances.* (*C. & N. W. Ry. Co. v. Chicago*, 140 Ill. 309-318.) This doctrine has been strongly restated in *Village of Altamont v. B. & O. S. W. Ry.*, 184 Ill. 47-51.

Recognizing this duty, the City Council has passed certain ordinances, which must next be considered.

Section 1741 of the Revised Code of Chicago of 1897 provides that within that portion of the city east of Western avenue and north of Thirty-ninth street, at all crossings of steam or horse railways, flagmen shall be stationed to give warning of the approach of any locomotive, engine or impending danger. This ordinance should, of course, be enforced by the Commissioner of Public Works, and, I understand from his office, is enforced.

Section 1742 provides:

“Whenever, on any street crossed by the track or tracks of any railroad company, the City Council shall deem it necessary to require said railroad company to provide protection against injury to persons and property at such crossing by the erection and maintenance of gates, guards or other protection, or the construction of a viaduct, said City Council may, by resolution, so declare and direct that any such railroad company . . . shall, within a certain time, to be fixed by the Mayor and Commissioner of Public Works, erect, construct and maintain a sufficient safeguard at such crossing, specifying the kind of protection to be erected, con-

structed and maintained as aforesaid, whether it be a gate or gates, or viaduct or other efficient protection; and it shall be the duty of the Commissioner of Public Works to serve upon the railroad company named in said resolution, a certified copy thereof, within thirty days after the passage of such resolution, and at the same time to notify the said railroad company, in writing, of the time fixed by the Mayor and said Commissioner within which the protection so ordered shall be constructed."

This section leaves the duty upon the City Council to pass upon the question of whether or not gates or other safeguards are needed. It fixes upon the Mayor and the Commissioner of Public Works the duty of acting in accordance with the resolution of the council after such resolution shall have been duly passed.

Sections 1743, 1744 and 1745 all refer to the same subject matter as Section 1743, *supra*, and have application only to those cases in which the council shall have first acted by the passage of a resolution as provided in said Section 1743.

So far as all the ordinances above referred to are concerned, the doctrine laid down by the Supreme Court of Illinois in the cases above referred to, construing the Illinois statute, is recognized and adopted.

The duty in the first instance is placed upon the City Council, and no duty is imposed upon the Mayor or the Commissioner of Public Works, or other executive officer of the city, until the City Council has first declared upon the necessity of gates or flagmen, as the case may be.

There is, however, another line of ordinances, 1748 to 1755, inclusive, dealing with the regulations for speed on enclosed tracks, which also have a bearing upon the question of gates and flagmen. Section 1750 provides as follows:

"Every person, firm, company or corporation owning, leasing or operating a steam railroad within the corporate limits of the City of Chicago, shall within such time as may be prescribed by the Mayor and Commissioner of Public Works, construct, or cause to be constructed, on each side of its tracks, and in such place with reference thereto as the Mayor and

Commissioner of Public Works shall approve or direct, except where public streets shall intersect or cross the same, substantial walls or fences of such material, design, proportion and height as shall be determined and approved by the Mayor and Commissioner of Public Works, and shall erect and maintain gates and signal bells and other safety appliances, operated from towers, or by other reliable means, satisfactory to the Mayor and Commissioner of Public Works . . . which gates, bells and other safety appliances shall be of such material, kind, design and proportion as shall be satisfactory to the Mayor and Commissioner of Public Works, and shall be maintained and operated by such device, and by competent attendants in charge thereof at all hours of the day and night. . . .”

I have no doubt as to the validity of that portion of said ordinance requiring tracks to be fenced and authorizing the Mayor and the Commissioner of Public Works to pass upon the “material, design, proportion and height” of such fences or walls. This part of the ordinance, it will be noted, legislates uniformly as to all rights of way and leaves no discretion in the executive officers as to whether or not the ordinance shall be enforced at any particular place.

The provisions, however, with regard to gates and other safety appliances are of a materially different nature. The requirement is only made at “such streets and public crossings . . . as may be designated by the Mayor and Commissioner of Public Works.” In my opinion, this is void legislation. It is not general or uniform in its effect. It would not lay down any general rule of conduct which would be applicable alike to all railroad companies and to all railroad crossings, but would be applicable to such railroad crossings as might be designated by the officers above named. If this ordinance were valid, the Mayor might require one railroad company to erect gates and safety appliances at all its street crossings, and might omit to make such requirements from another railroad company. It is an attempt to delegate legislative authority to executive officers, and is, in my opinion, unquestionably void. (*City of Chicago v. Trotter*, 136 Ill. 430-433.)

I think that this section should be at once amended by striking out the words "by the Mayor and Commissioner of Public Works", in the sixth line from the top of page 370 of said section, and by inserting in lieu thereof the words "by resolution of the City Council."

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 27, 1904.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

Under date of October 20, 1904, you directed a letter to this department which reads as follows:

"As a result of the threatened invasion of the north shore district claimed by Capt. Streeter and others, I was visited to-day by the captain and lieutenant of the Lincoln Park Police. They expect in case of trouble the co-operation and assistance of the city police in preventing William H. Niles, who claims the title of "Military Governor of the District of Lake Michigan", from occupying the boulevard, streets or public highways of the territory over which the Lincoln Park Commissioners have jurisdiction.

"There may be many technical points involved in responding to the request of the Lincoln Park police for assistance in expelling Niles' anticipated invasion scheduled for November 1st.

"What jurisdiction or authority have the Chicago city police in the territory controlled by the Lincoln Park Board; will it be necessary for them to be deputized as park police in order to co-operate with the regular park police; what right have city police to resist or arrest a force carrying arms with their weapons in full view of the public and before committing any overt act other than appearing so armed in public in a body; must the police wait until this expected expedition of Niles obstructs the public highway by their presence or commit a felony before the police are authorized to act?

"An answer to the above questions and any other informa-

tion which may have a bearing on the subject, at your earliest convenience, will be much appreciated.

"Yours very truly,

"Francis O'Neill,

"Gen'l. Sup't. of Police."

Replying to your letter, I beg leave to say that police officers by statute are expressly made conservators of the peace, and have all the common law powers of a peace officer both in respect to the enforcement of the city ordinances and also of the criminal laws of the State:

"The trustees in villages, the mayor, aldermen, and the marshal and his deputies, policemen and watchmen in cities, if any such be appointed, shall be conservators of the peace, and all officers created conservators of the peace by this act, or authorized by any ordinance, shall have power to arrest or cause to be arrested, with or without process, all persons who shall break the peace, or be found violating any ordinance of the city or village, or any criminal law of the State, commit for examination and, if necessary, detain such persons in custody over night or Sunday in the watch house or any other safe place, or until they can be brought before the proper magistrate, and shall have and exercise such other powers as conservators of the peace as the City Council or Board of Trustees may prescribe. All warrants for the violation of ordinances, and all criminal warrants to whomsoever directed, may be served and executed within the corporate limits of any such city or village by any policeman of such city or village; such policemen being hereby clothed with all the common law and statutory power of constables for such purposes." (Hurd's Rev. Stat., 1903, p. 298, par. 83.)

It has been decided by our Supreme Court that "Park Commissioners are a municipal corporation and an agency of the State for governmental purposes." (*People ex rel. v. Salamon*, 51 Ill. 37; *West Chicago Park Commissioners v. McMullen*, 134 Ill. 170.)

The power of the Park Commissioners is, however, limited to the parks and streets under their jurisdiction; they have no power outside of the street lines of the streets under their jurisdiction; but such power is exclusive except so far

as otherwise expressly provided by ordinances conveying the streets by the city. (*McCormick v. Park Commrs.*, 150 Ill. 516.)

"The West Chicago Park Commissioners are a municipal corporation which within the purview of its powers is not subordinate to the City of Chicago in the laying out, improvement, management and control of parks, boulevards and streets committed to its charge. Its jurisdiction is paramount and exclusive. Two municipal corporations cannot exercise the same powers, jurisdiction and privileges in the same territory at the same time." (*West Chicago Park Commrs. v. City of Chicago*, 152 Ill. 392.)

The decisions quoted were all rendered in cases originating in questions of jurisdiction for the purpose of taxation, or questions relating to the exercise of the right of eminent domain; no decision has been found in which the question of the jurisdiction of the police officers of these different municipalities has been discussed. As a general proposition, it may be said that the function of the police force of the Park Commissioners is primarily to enforce the park ordinances; the primary function of the police force of the City of Chicago is to enforce the ordinances of the city and the law of the State.

I am of the opinion that the police force of the City of Chicago has authority to enforce the ordinances of the City of Chicago, as well as the criminal law of the State, in all places within the corporate limits of the City of Chicago, including the parks and boulevards subject to the jurisdiction of the Park Commissioners.

Your inquiry relates specifically to what is facetiously called the "District of Lake Michigan"; in that district I do not understand that the Lincoln Park Commissioners have any jurisdiction. Their jurisdiction, as has been seen, extends only over the parks and streets which have been ceded to them; among these are the Lake Shore Drive and Lincoln Park boulevard, adjoining the "District" in question. At all points within the "District of Lake Michigan" itself, the police force of the Lincoln Park Commissioners are without jurisdiction.

In answer to that part of your inquiry relating to the right of the police to resist or arrest a force carrying arms, etc., I beg to call your attention to certain provisions of the statutes which I think are applicable to circumstances such as you expect will arise under which it would seem that an armed expedition such as you suggest, would itself be unlawful and it would not be necessary to wait until an overt act had been committed. The sections referred to are as follows:

“Whoever wilfully disturbs the peace and quiet of any neighborhood or family, by loud or unusual noises, or by tumultuous or offensive carriage, threatening, traducing, quarreling, challenging to fight or fighting, or whoever shall carry concealed weapons, or in a threatening manner display any pistol, knife, slung-shot, brass, steel or iron knuckles, or other deadly weapons, shall be fined not exceeding one hundred dollars.” (Hurd’s Rev. Stat., 1903, Ch. 38, par. 56, p. 627.)

“If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a judge, justice of the peace, sheriff, coroner, constable or other public officer, the persons so offending shall be severally fined not exceeding \$200. (Hurd’s Rev. Stat., 1903, Ch. 38, par. 252, p. 661.)

“When twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more, armed or unarmed, are unlawfully, riotously or tumultuously assembled in any city, village or town, it shall be the duty of each of the municipal officers, constables and justices of the peace thereof, and of the sheriff of the county and his deputies, to go among the persons so assembled, or as near to them as they can safely go, and in the name of the State command them immediately and peaceably to disperse; and if they do not obey, such officers shall command the assistance of all persons present, in arresting and securing the persons so unlawfully assembled; and every person refusing to disperse or to assist as aforesaid, shall be deemed one of such unlawful assembly, and shall be fined not exceeding \$500, and confined in the county jail not exceeding one year; and each such officer having notice of such unlawful assembly, and refusing

or neglecting to do his duty in relation thereto, as aforesaid, shall be fined not exceeding \$100." (Hurd's Rev. Stat., 1903, Ch. 38, par. 253, pages 661-2.)

"When persons so riotously or unlawfully assembled neglect or refuse on command as aforesaid, to disperse without unnecessary delay, any two of the magistrates or officers aforesaid may require the aid of a sufficient number of persons, in arms or otherwise, and proceed in such manner as they judge expedient to suppress such riotous assembly and arrest and secure the persons composing it; and when an armed force is thus called out, they shall obey the orders for suppressing such assembly and arresting and securing the persons composing it, which they receive from the governor, any judge of a court of record, the sheriff of the county, or any two of the magistrates or officers mentioned in the preceding section." (Hurd's Rev. Stat., 1903, Ch. 38, par. 254, page 662.)

"It shall not be lawful for any body of men other than the regularly organized volunteer militia of this State, troops of the United States, Grand Army Posts, camps of the Sons of Veterans or organizations of ex-soldiers of the Spanish-American war or Philippine insurrection to associate themselves together as a military company or organization, to drill or parade with arms in this State, except as hereinafter provided: *Provided*, that by and with the consent of the Governor, independent regiments, battalions or companies, organized for the purpose of recreation or to acquire military knowledge that may better enable them to serve the State in time of public peril, if such should arise, may associate themselves together as a military body or organization, and may drill or parade with arms in public in this State: *Provided further*, that students of educational institutions, where military drill is a part of the course of instruction, may, with the consent of the Governor, drill and parade with arms in public under command of their military instructor: *Provided*, that nothing herein contained shall be construed so as to prevent benevolent or social organizations from wearing swords. All military organizations in and by this section permitted to drill and parade with arms, shall, on occasions of public parade, be required to carry the United States flag in addi-

tion to any private ensign which they may carry: *Provided*, that the consent herein specified may be withdrawn at the pleasure of the Governor." (Hurd's Rev. Stat., 1903, Ch. 129, par. 105, page 1794.)

Trusting that the foregoing fully answers your inquiries, I am,

Yours very truly,
WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 27, 1904.

TO THE HONORABLE, THE BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

I hereby acknowledge receipt of your favor asking for an opinion as to whether the following, or a similar clause in contracts between the city and contractors for public improvements, is legal and enforceable:

"The contractor or contractors shall bid with the express understanding that the work to be performed under these specifications shall be commenced not later than thirty (30) days from the time of awarding the contract for same and shall be completed on or before, and that the said time specified for completion of the work is an essential condition of this contract. In case the contractor or contractors shall fail to complete the work at the time specified, he or they shall pay to the City of Chicago as assessed, agreed and liquidated damages, the sum of twenty-five dollars (\$25) per day for each and every day that shall elapse after the specified date for completion of same, until the work is actually completed and accepted. Provided, however, that if the contractor or contractors is or are delayed by the City of Chicago in the commencement of the work or in case the work is suspended by order of the city authorities, then the time of such delay or suspension shall be added to the time for the completion of this contract."

In reply I beg leave to say that in my opinion such a

clause would, unquestionably, be valid and enforceable in law. There can be no doubt, whatever, as a general proposition, as to the validity of clauses of this character. But the only question which could arise from such clauses would be in respect to the measure of damages that could be recovered. If the wording of such clauses clearly indicates that the penalty is to be accepted as agreed and liquidated damages, and, if the amount of such penalty is not unreasonable, and if the actual damages are not susceptible of ascertainment, the courts would accept the amount named as the measure of damages, irrespective of the actual damages sustained. However, on the other hand, if the amount named is unreasonable or out of proportion to the size and character of the work, and if the actual damages could be readily ascertained, or if it would be oppressive and unreasonable to accept the penalty stated as the measure of damages, the tendency of the courts is to limit the recovery to the actual damages sustained.

Radloff v. Hasse, 196 Ill., 365.

Hennessy v. Metzger, 152 Ill., 505.

Considering the clause in question, I think the amount named therein is reasonable; that the wording thereof clearly indicates that it is the intention that the amount named shall be accepted as the measure of damages, irrespective of the actual damages sustained; and, in view of the fact that the actual damages would be difficult of ascertainment, I am of the opinion that the amount named as liquidated damages would be accepted by the courts as the proper measure of damages.

This opinion is in accordance with one heretofore rendered by former Corporation Counsel Charles M. Walker, dated May 22, 1900, addressed to L. E. McGann, the then Commissioner of Public Works, in which the measure of damages in the penalty clause in the contract between the city and Joseph J. Duffy was held to be the amount named in the penalty. On this point said opinion contained the following language:

“Though the matter is not mentioned in your letter, as it is one connected with the making up and payment of the final estimate, it seems proper to call your attention to the feature of Mr. Duffy’s contract, which requires him to complete the

work within two years from the date of signing the contract, and on his failure so to do, subjects him to a payment of \$200 per day to the city, as liquidated damages.

Considering the magnitude of the work, and the very great difficulty of estimating correctly the loss that would accrue to the city by reason of delay, this sum of \$200 does not appear to be unreasonable, and it is more than probable that any court would accept the amount as the proper measure of damages. At the same time, unless the delay in completion is attributable to the fault of Mr. Duffy, the \$200 per day cannot be deducted from the amount that may be due him.

Very respectfully yours,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

FRANK JOHNSTON JR.,

Assistant Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 27, 1904.

MR. E. M. LAHIFF, City Collector.

Dear Sir:

Replying to your letter of September 14th, with enclosed letter from Messrs. Alling & Jacobson, asking whether or not that firm is required to have a junk dealer's license, I beg to advise you that it appears from their statement that they are doing a wholesale business in rags, rubber and metal, which are purchased outside of Chicago, shipped to their wholesale house here, where same are assorted and shipped to the mills; that they do not make any purchases from anyone in Chicago.

Section 1793 of the Revised Code of 1897 provides as follows:

“No person shall use, exercise or carry on the business of a keeper of a junk shop, or what is commonly called a junk shop, for the purchase and sale of junk, rags or old rope, paper or bagging, old iron, brass, copper, tin, empty bottles, slush or lead; nor carry on any such business at any other house or place than the one designated in such license; nor draw or

drive, or procure to be drawn or driven, through the streets of this city, any handcart, wheelbarrow or other cart or vehicle, or use any boat or other kind of vessel for the purpose of collecting or disposing of said articles; nor shall any person be entitled to have a cart or carts, boat or boats, or other vehicle or vehicles to be used for the aforesaid purpose; nor shall any person be entitled to so use any such cart, boat or other vehicle unless he is a citizen, without being first licensed by the Mayor for such purpose, nor shall any person continue to carry on such business after his license may have been revoked. Every person who shall violate any or either of the provisions of this section shall be subject to a fine of not less than \$25 nor more than \$100 for each and every offense."

You will observe that the ordinance makes no distinction between a wholesale and a retail dealer in rags, rubber and metal, and the question is, is this firm carrying on a business within the meaning of the ordinance? I am of the opinion that they are, and that they should be required to take out a license.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

OCTOBER 29, 1904.

FRANK I. BENNETT, Esq., Chairman,

Committee on Finance of the City Council:

Dear Sir:

In answer to your inquiry as to whether or not any portion of the existing surplus in the "water fund" can be transferred to the "corporate fund", I beg leave to say:

In 1836 the Legislature of this State passed an act entitled "An Act to Incorporate the Chicago Hydraulic Company." Said act created a private corporation of that name and authorized it to construct, maintain and operate a system of water works in Chicago for the purpose of supplying water to the city and its people.

In 1851 the Legislature passed another act, entitled "An Act to Incorporate the Chicago Hydraulic Company." By this act a body corporate was created by the name and style of a "Board of Water Commissioners of the City of Chicago." The first commissioners were named in the act, their successors to be chosen by the Common Council of the city. This was a quasi-municipal corporation, exercising municipal functions, whose relations to the city were similar to the relations now existing between the city and the Board of Education. By Section 15 of that act the commissioners were required to invest their surplus "in such manner as to make the same available for the payment of the interest and principal of the bonds" which other sections of the act had authorized them to issue upon the faith and credit of the city. Section 19 authorized the commissioners to purchase all the rights and property of the Chicago Hydraulic Company. In 1852 this purchase was consummated, and the City of Chicago, through this Board of Water Commissioners, entered into the business of owning and operating a system of water works for the City of Chicago.

By amendments made to this act in 1855, the manner of electing water commissioners was changed, the commissioners were authorized to borrow more money upon the faith and credit of the city, and it was "provided, further, that all funds derived from the sale of the bonds of the said board, or from water rents or otherwise, shall be exclusively used for and appropriated by said board to the objects and purposes specified in said act, of which this is an amendment, nor shall the same, or any part thereof, be loaned to or used by the said City of Chicago." Substantially the same provisions were re-enacted with regard to the investment of the surplus profits of the water business.

The above mentioned acts of 1851 and 1855 do not, in their titles, purport to be amendments of the city charter, but in construing a similar act, the Supreme Court of Illinois declared that such legislation was "in substance and in fact and in legal effect, in addition to the charter of the city . . . and invested the city with new and additional powers." (*Board of Water Commissioners v. The People*, 137 Ill., 660, 667.)

In 1861 the Legislature revised and amended the various acts constituting the charter of the City of Chicago, and by Section 3 thereof created the Board of Public Works. Section 9 of that act gave that board superintendence of the water works of said city. Section 50 stated the true intent of the act to be to abolish the "Chicago City Hydraulic Company" and to vest all its powers in the Board of Public Works. This reference in the act to the Chicago City Hydraulic Company undoubtedly arose from the use of that name in the title of the acts of 1851 and 1855, and undoubtedly operated to abolish the "Board of Water Commissioners of the City of Chicago" and supersede said board by the "Board of Public Works." Section 52 of said act provides that "all accounts pertaining to the hydraulic works of said city shall be kept in separate books of account, and all moneys deposited with the City Treasurer on account of said works shall be by him kept separate and distinct from all other moneys, and shall only be applied for the uses and purposes for which the same were received." Said section also makes the Treasurer guilty of embezzlement if he pays out such moneys on any other account.

By the provisions of the revision of 1863, Chapter VIII., Section 13, it is provided "that all funds derived from the sale of said water loan bonds, or from water rents, or otherwise, for the water works of said city, shall be exclusively used and appropriated by said board, to the objects and purposes pertaining to the water supply of said city, herein specified, nor shall the same, nor any part thereof, be used by the said board, or by the said city, for any other purpose." Section 32 of the same act requires that the money derived from the water works shall be "kept separate and distinct from all other moneys, as the water fund, and shall only be applied for the uses and purposes for which the same were received, and such money shall be held by the Treasurer as a special fund, separate and distinct from other funds; and he shall be deemed guilty of embezzlement if he shall pay out such moneys for any account other than that belonging to such water fund."

It here becomes material to note that the act of 1861,

above referred to, revising the charter of the City of Chicago, was approved February 18th of that year, and that on February 21st of the same year an act of the Legislature of Illinois was also approved by the Governor, granting similar powers to and imposing similar restrictions on the City of Springfield in regard to its water works. The language of the two acts in regard to this subject matter is almost identical.

The effect of the legislation above referred to was undoubtedly to limit the use of the "water fund" for water purposes. If the acts above cited are still in force, your question must receive a negative answer. It therefore becomes material to consider next the effect of subsequent legislation.

In 1872 the Legislature passed the Cities and Villages Act, which, upon adoption by vote of the people, became, in 1875, the charter of the City of Chicago, and according to the unbroken current of authority in this State, superseded all acts inconsistent therewith. With respect to the subject matter of the control of water works, and the money derived therefrom, said act gives the City Council power to make all needful rules and regulations concerning the use of water supplied by the water works; power to do all acts and make such regulations for the construction, completion, management or control of the water works as it may deem necessary or expedient; power to do all acts and make such rules and regulations as it may deem necessary and expedient for levying and collecting water taxes, rates or assessments, and power to levy and assess water taxes, rents, rates, or assessments. The act of 1872 also enumerated certain city officers and distributed among them the powers and duties of the executive and the administrative departments of the municipal government of the City of Chicago. Said act contained no provision for the appointment or election of a Board of Public Works, but its duties were distributed among other officers.

Fortunately, this identical question was presented to the Supreme Court of Illinois, and that tribunal decided, in the case above referred to, that the Cities and Villages Act, when adopted by the City of Springfield, did supersede said act of 1861, creating a Board of Water Commissioners for the City of Springfield. This case was an information in the nature of

a quo warranto. A judgment of ouster was entered against the Board of Water Commissioners of the City of Springfield, and this judgment was affirmed by the Supreme Court. This opinion, construing an act evidently copied from the Chicago act of 1861, is conclusive upon this question. There can be no doubt that all of the water acts above referred to ceased to be of any force and effect after the adoption of the general Cities and Villages Act. The Board of Public Works of the City of Chicago then went out of existence, and the limitations upon that board in regard to the use of moneys derived from the water works ceased and determined on the same day. The question now presented is as to the rights of the City Council in regard to the disposition and control of the water fund under the Cities and Villages Act and subsequent legislation. There are numerous subsequent acts in regard to water. A careful examination of each one of them, however, shows that they have no application whatever to the use to be made of the income which the City of Chicago derives from its water works; so that the question resolves itself into an examination of the general Cities and Villages Act.

The provisions of this act have already been briefly referred to, and it is apparent that the control of the entire subject matter is vested in the City Council, and that no limitations have been placed upon that body by the Legislature.

Moreover, the extent and scope of the powers of the City Council in regard to the administration of municipal water works, under the Cities and Villages Act, have been considered and discussed by the Supreme Court of Illinois. In the well considered case of *Wagner v. City of Rock Island*, 146 Ill., 139, the Court said:

“When a municipal corporation undertakes to construct and operate water works, it does so in the exercise of its private and not of its governmental functions.”

The question was squarely raised in that case as to whether or not the city had any right to charge its inhabitants for the use of water a sum greater than the actual cost of the service. On this point the Court said (page 155):

“The complainant, however, has attempted to distinguish the present case from those to which the foregoing authorities

apply, by alleging that the water works in question were not erected by the city for purposes of speculation or profit, or of deriving therefrom a revenue by the sale of water to its citizens, but only for the purpose of supplying water . . . for the use of itself and its inhabitants."

Indeed, the original charter of the City of Rock Island, under which it was formerly operated and under which the water works in question were built, gave its City Council power to "provide the city with water . . . for the extinguishment of fires and the *convenience* of its inhabitants;" so that a serious question existed as to its right, under said former charter, to sell water at a profit. But the Supreme Court said (page 155):

"Even admitting that such was the policy of the city and its officers at the time they embarked upon the enterprise of building water works and supplying the people of the city with water, we are unable to see how that fact can have the legal significance claimed for it. . . . Its power to build and maintain water works and furnish water to its inhabitants for a consideration is derived from and is governed solely by the statute, and even though the intention of the city and its officers may have been to furnish water to the people of the city at the mere cost of maintaining and operating the works, and to charge no rates which would result in accumulating a surplus revenue, the city is not bound to persist in that policy, but is at liberty at any time to abandon it and impose reasonable rates and charges, although by so doing a revenue may be realized."

After discussing the principles upon which a private water company might furnish water to the inhabitants of a city, the Court further said (page 156):

"And in the case of water works, we are unable to see why any different rule in this respect should apply when the works are owned and operated by the city, from those which prevail where the business is carried on by a private corporation."

In the Joliet Water Works case (*City of Joliet v. Alexander*, 194 Ill., 457), the case was presented of an attempt to pledge existing water works and the existing water fund. It

appeared in that opinion that there was an annual surplus from the existing plants of ten thousand dollars a year. The Court held that this surplus belonged to the City of Joliet, and that it stood upon the same basis as any revenue of the city "derived from dram shop license, or license from hackmen, peddlers, theaters or amusements, or any other funds of the city." While the very point now under consideration was not there involved, yet it would have been impossible for the Supreme Court to have reached the conclusion which it did reach in that case if the surplus of the water fund had been considered to be a special fund limited in its use to water purposes. Upon the assumption that this fund was the city's, to be freely used for corporate purposes like any other fund, the whole course of reasoning of the Court is founded.

If the water works in this city were owned by a private corporation, and the business carried on by that corporation at a profit, there could be no doubt of the right of that corporation to devote its surplus to any purpose which it saw fit; and since the rights of the city in regard to the water business are controlled by the same principles of law which would have application to a private corporation engaged in the same business, I have no doubt of the right of the city to devote its surplus revenue from the water business to any corporate purpose. In fact, the decision of the Supreme Court that a municipality may so fix the prices for water as to produce a profit, carries with it the conclusion that it may expend that profit for any legitimate municipal purpose. In all other jurisdictions where public utilities are owned and operated by the municipality (particularly in Great Britain), the surplus profits of the business, after providing for all liabilities, improvements and betterments, are uniformly applied to the reduction of taxes.

The transfer of the surplus in the "water fund" to the "corporate fund", and its use in the payment of the city's current expenses, undoubtedly operates to reduce the burden now borne by the owners of taxable property.

I am, therefore, of the opinion that the City Council has

the authority, by appropriate legislation, to direct the transfer of the surplus in the "water fund" to the "corporate fund."

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

OCTOBER 31, 1904.

FRANK I. BENNETT, Esq.,

Chairman of Committee on Finance of the City Council.

Dear Sir:

In answer to your verbal inquiry as to whether or not any portion of the proceeds of the bond issue authorized by ordinance of the City Council passed July 18, 1904, can be used to pay the indebtedness already contracted by the city for permanent improvements, and to take up tax anticipation warrants by the pledge or sale whereof money was obtained for use in making such permanent improvements, I beg leave to say:

None of the taxes based upon the appropriation bill and levy ordinance for 1904 have yet been extended. The taxes based upon the appropriation bill and levy ordinance of 1903 have been extended and are now in process of collection by the County Treasurer, but there will be no final settlement with him in regard to said taxes until the end of this year. I understand that tax anticipation warrants have been issued against the taxes levied for the years 1903 and 1904, and that upon these tax anticipation warrants money has been borrowed from the banks, of which there has been expended on account of said permanent improvements \$393,233.71 in 1903, and \$279,262.74 in 1904, which still remains unpaid.

Upon this statement of facts my opinion is requested as to whether or not the money to be received from the proceeds of the sale of bonds above referred to may be used to take up and retire tax anticipation warrants issued against the taxes levied during the years 1903 and 1904.

At the very outset of this discussion it should be borne in mind that the ordinance authorizing the issue of said permanent improvement bonds provided that the proceeds of said bonds should be used "solely for the purpose of making

permanent municipal improvements," etc., and the question which arises must therefore be stated as follows:

Is the repayment of a loan, the proceeds of which were used for making permanent improvements, equivalent to the use of the money for the purpose of making permanent improvements?

The statutes of Illinois with reference to the levying of school taxes provide for the levy of two distinct and separate classes of taxes: one for "educational purposes", the other for "building purposes."

The Supreme Court of Illinois has always maintained most strictly the rule that the school building tax can be used only for building purposes, and that no tax levied for building purposes can be used for general educational purposes.

In *C. & A. R. R. Co. v. The People*, 205 Ill., 625, the legality of a levy for building purposes came before the Supreme Court of Illinois, in which a tax was levied for building purposes for the year 1902. It appeared that this tax was levied not for the purpose of building a school house, but for the purpose of paying outstanding bonds, the proceeds of which had been used during the years 1888 and 1901 for the erection of two school houses. It was contended, on the one hand, that the payment of these bonds was not the use of money for "building purposes." On the other hand it was urged that the bonds were merely an evidence of indebtedness incurred for building purposes, and that the payment of the debt evidenced by said bonds was legally equivalent to the use of the money for the construction of said school houses. The Supreme Court sustained the latter view and used the following language:

"If a bonded indebtedness has been incurred for educational purposes, the tax to meet it must be levied as an educational tax, and if such indebtedness has been incurred for building purposes the tax levied to meet it must be levied for building purposes."

Upon the authority of this decision of our own Supreme Court, upon a question so exactly parallel to the one under consideration, I am of the opinion that the use of the proceeds of the sale of the permanent improvement bonds referred to,

for the payment of the outstanding indebtedness of the city for money borrowed for and used in the making of permanent improvements, amounts in law to the use of said money for the making of permanent improvements, within the meaning of the law.

I submit herewith form of ordinance, at your request, to authorize the payment of such unpaid indebtedness for the years 1903 and 1904, out of the proceeds of the sale of said bonds.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

NOVEMBER 3, 1904.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

I have your favor of October 18th, wherein you refer to a letter of Comptroller McGann, attached to your letter, concerning the payment of a bill incurred for the fare of prisoners from the South Chicago station to the institutions to which they were committed by police magistrates, in which you wish to be advised as to who has the custody of prisoners, who have been arrested by the police, after they have been fined for violation of city ordinances or held to the Criminal Court by the police magistrate. You also wish to be advised as to whether or not the bailiffs of police courts are under your jurisdiction.

Replying to the first branch of your inquiry, I beg leave to advise you that, in my opinion, a prisoner who has been committed or bound over by a police magistrate is in the custody of whatever officer is designated by the magistrate to receive such prisoner into his custody; that may be the police court bailiff or a police officer, or a constable or deputy sheriff. Unless such prisoner is committed by the magistrate to the custody of a police officer, he is not in your custody.

As to the second branch of your inquiry, I am of the opinion that police court bailiffs are not members of the police department, although by ordinance it is provided that "bailiffs shall be sworn in as policemen and shall possess all the power and authority of constables at common law and under the

statutes of this State . . . (Section 1555, Revised Code of Chicago, 1897). Bailiffs are appointed by the Mayor subject to confirmation by the City Council. They are a part of the police courts. They are no more a part of the police department than are the police magistrates themselves.

The mere fact that in the last annual appropriation bill the City Council grouped the appropriation for the maintenance of police courts under the general heading of "Police Department" does not make such courts a part of the police department.

Yours very truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

NOVEMBER 7, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have a communication from you of the 28th ult., transmitting a communication from the President of the Municipal Association of Evanston, and asking the opinion of this department as to the method of measuring the distance of four miles from the university, with reference to certain saloons said to be located within the so-called four-mile limit.

The question raised may be briefly stated as follows: Is the distance of four miles under the prohibition act of February 14th, 1855, that no liquor shall be sold within four miles of the location of the Northwestern University, to be measured by an air line or over the shortest traveled route between said university and the place where the liquor is sold? The act creating the Northwestern University provides by Section 2:

"No spirituous, vinous or fermented liquor shall be sold, under license or otherwise, within four miles of the location of said university, except for medicinal, mechanical or sacramental purposes, under the penalty of \$25 for each offense, to be recovered before any justice of the peace in said county, in an action for debt, in the name of the County of Cook; Pro-

vided, that so much of this act as relates to the sale of intoxicating drink within four miles may be repealed by the General Assembly whenever they think proper."

No indication whatever is given beyond these words of the mode of measurement intended to be applied by the Legislature.

This identical question arose under the administration of his Honor, Mayor Swift, and on March 7th, 1896, the then Corporation Counsel, Mr. Wm. G. Beale, rendered an opinion to the Mayor in which he reached the conclusion that the distance between a certain saloon and the Northwestern University should be measured by the shortest traveled road, and not by an air line. The opinion, after citing the case of *O'Leary v. the County of Cook*, 28 Ill., 534, wherein the Supreme Court decided that the prohibitory legislation involved in the section above quoted was not void as being not germane to the title of the act, contains the following language:

"In view of the fact that human beings cannot pass through the air 'as the crow flies', that they cannot lawfully trespass upon private lands for paths of travel, and that public highways are provided for public use, the Legislature must, I think, be supposed to have fixed this four-mile limit in contemplation of the existence and use of such highways. The attention of the Legislature was distinctly directed to the subject of travel and intercommunication between two places, and it must have had in mind the ordinary and lawful routes of travel. Its declaration, in substance, that no saloon shall be located within four miles of the university seems naturally and reasonably to mean that the distance is to be measured by the shortest public road."

It appears to me that the reasoning of this opinion is fallacious, for the reason that this mode of measurement must necessarily be rendered changeable and uncertain by any changes in the traveled road which would render the distance longer or shorter, but if, on the other hand, the air line measurement be adopted, there could be absolutely no uncertainty in its determination. The distance by the nearest traveled road between the university grounds and a particular dram-shop in the year 1855 would be constantly changed by the

opening of more direct highways between the two points. This view is supported by abundant authority of the courts.

In *Jewel v. Stead*, 6 Ellis & Blackburn, 350, certain trustees were authorized by a turnpike act to erect toll gates, but not "within three miles of Bar Gate." Lord Campbell, speaking for the court, said:

"I am of the opinion that the mode of measurement in this case is along the straight line on the horizontal plane . . . Unless there appear in the act a clear indication that there was a contrary intention, this mode of measurement should be adopted."

In *Lake v. Butler*, 5 Ellis & Blackburn, 92, the same justice said, in determining that an air line rather than the nearest traveled road distance should govern:

"Now, if the distance is to be measured by the nearest practicable way, see how uncertain it is. The nearest mode of access may be by boat, by a route varying every day according to the state of the tide, or, if it be by land, it may be rendered longer or shorter by changes in the road, but if the straight line measurement be adopted, there can be no uncertainty. Even where there are mountains to be ascended and descended, it is easy for a surveyor to ascertain the distance from point to point."

To the same effect are: *Mouflet v. Cole*, L. R. Exch., page 32; *Commonwealth v. Jones*, 142 Mass., 573; *Regina v. Saf-ron Walden*, 9 Ad. & El. N. S., 76; *Dingman v. Walker*, 28 L. J. Chancery, 867; *Love v. Porter*, 93 Ala., 384; *In re Liquor Locations*, 13 R. I. 733; *State v. Greenway*, 92 Ia., 472; *Butler v. State*, 89 Ga., 821.

In an opinion to the City Collector of date of August 15th, 1903, the view of this question which I have presented above was adopted. Since the rendition of this opinion Judge Tuley has rendered a decision in the case of *County of Cook vs. Peter Sesterhenn*, substantially holding that the four-mile distance from the Northwestern University must be measured in a direct line from the nearest point of the university grounds in Evanston, and not by the nearest traveled road.

Assuming that the distances mentioned in the communication from the Municipal Association are correct, and that,

taking University Hall, located in the grounds of the Northwestern University at Evanston, as a starting point, the southern boundary of the four-mile zone lies 1,487.4 feet south of the center line of Devon avenue at Clark street, and 1,154 feet south of said center line at Evanston avenue, all dram shops located within such distances are included under the prohibition of the statute.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

NOVEMBER 9, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

On October 11th, 1904, in answer to your request, an opinion from this department was forwarded you, reviewing in some detail the evidence which was introduced on the trial of P. J. O'Hare for violation of the wine-room ordinance. This trial resulted in a verdict of guilty; a motion for a new trial was duly argued and a judgment was entered upon the verdict. Upon said conviction an appeal was prayed to the Appellate Court, bond filed and approved, and although the record has not yet been filed in the Appellate Court, the case may be treated as though the appeal was duly perfected by the filing of said bond.

We reached the conclusion, in the opinion above referred to, that under the statutes and ordinances in force, said conviction required a revocation of O'Hare's saloon license. Subsequently you revoked said license. An application was at once made for a reconsideration of the matter, and counsel for O'Hare asked permission to file briefs and make an argument to show that the revocation of the license was premature and not warranted by law. We acceded to this request and also to a request of the attorneys for the Hyde Park Protective Association that they might also submit a brief in reply. The attorneys for both sides have filed briefs and voluminous affidavits. Mr. O'Hare's attorney has filed a large number of

affidavits of the good character and reputation of his client and of the orderly and reputable nature of his client's business. Herewith find transmitted for your inspection the affidavits pro and con on the question of good character.

It is perhaps only fair to Mr. O'Hare to say that, aside from the matters at issue in the prosecution above referred to, involving the offense of keeping a wine room, the preponderance of the evidence is in his favor.

There is also a sharp conflict of evidence with regard to whether or not O'Hare himself was guilty of personal complicity in the offenses charged against him, but in view of the fact that those issues were submitted to a jury, decided by them and their decision approved by the trial court, I think that that issue must be conclusively presumed against him.

I, therefore, in the reconsideration of this case, have treated this matter as though Mr. O'Hare were a man of good character, keeping a reputable saloon, who had, however, been convicted of a violation of the wine-room ordinance and had appealed from that conviction to the Appellate Court, said appeal being there pending and undetermined.

The question for consideration, therefore, is purely a question of law and may be stated briefly as follows:

Does such a conviction, after an appeal has been perfected therefrom, require you, under the ordinances, to revoke the license?

It is urged by counsel for Mr. O'Hare that the revocation of the license is a part of the penalty resultant from the conviction, the other part being the imposition of the fine; that these two elements stand on the same footing, and that the appeal not only prevents the enforcement of the judgment for the fine, but prevents also the enforcement of the penalty of revocation. I have given this point very mature consideration, and have been compelled to dissent from the view thus urged. It will be noted that the statute does not give the jury or the trial court power to return as a part of the verdict and judgment a finding upon the issue of revocation. The revocation is not a part of the judgment; it is clearly a consequence following the conviction. If the jury and the court had, by the statute, been given authority to find and adjudge that the

license be revoked, there would be much force to the point; but since the filing of the appeal bond suspends only the enforcement of the judgment itself, and the revocation is an executive act of the Mayor, I am clear that the filing of the bond is in itself of no effect as to your action.

It is also of peculiar significance that the framers of the ordinance did not make the revocation a judicial question nor permit that to be one of the issues to be tried in the prosecution. They imposed upon the executive the duty of revoking the license "upon the conviction." That the conviction is complete when the judgment of the trial court has been entered upon the verdict of the jury is not to my mind an open question. (*Faunce v. The People*, 51 Ill., 31.)

It has been frequently decided that a judgment may be pleaded as *res judicata*, and operates as an estoppel of the question there involved, even although an appeal therefrom has been perfected. (*Moore v. Williams*, 132 Ill., 590; *People v. Rickert*, 159 Ill., 499.)

It is also established beyond question that the lien of a judgment is not affected or destroyed by an appeal, but that the execution of the judgment is merely suspended. The judgment remains "in full force all the time as a vital judgment of the court." (*Curtis v. Root*, 28 Ill., 377; *Oakes v. Williams*, 107 Ill., 158.)

The Supreme Court of Missouri, in a case involving a similar question, said:

"One of the principal grounds of complaint here is that Saunders, one of the co-defendants of plaintiff in the former action, was not allowed to testify. He had been indicted for obtaining money under false pretenses and had been convicted by a jury, but had appealed to this court and obtained a super-seedeas. He was brought to court on the trial by the sheriff and offered as a witness, but the court excluded him. Our statute provides 'that anyone convicted of burglary,' etc., 'shall be incompetent to be sworn as a witness. . . .' The only question is whether Saunders, sentenced, as he had been, to the penitentiary, though he had appealed to this court where the judgment was reversed, was at the time he was offered as a witness a competent one. We think the Circuit Court prop-

erly excluded him. He was convicted of a crime which disqualified him as a witness and the subsequent reversal of that judgment by this court could not be anticipated by the Circuit Court.”.

Ritter v. Democratic Press Company, 68 Mo., 460.

I am of the opinion, therefore, that the conviction of P. J. O'Hare in the Criminal Court of a violation of the wine-room ordinance is an adjudication of the fact of his guilt, which adjudication remains in full force and effect, notwithstanding the appeal, and that it establishes such a status for O'Hare as disqualifies him from receiving a saloon license until that judgment is reversed or set aside.

On careful reconsideration of the whole matter, therefore, I am of the opinion that your action in revoking this license was not only sustained by the law, but was the discharge of a duty imposed upon you by the ordinance, and that your said action should not, by reason of anything which has been thus far presented, be rescinded.

Very respectfully submitted,

EDGAR B. TOLMAN,
Corporation Counsel.

NOVEMBER 11, 1904.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

Your favor of October 31st, addressed to the Corporation Counsel, has been referred to me for reply.

You ask, "In case a number of men carrying arms, concealed or exposed, should locate on vacant property not dedicated to street or public purposes, what are the rights and duties of the city police under the circumstances?" Your question refers specifically to the circumstances which would arise in case that William H. Niles and his followers seek to carry out their announced purpose of descending in force on the so-called "District of Lake Michigan."

Replying to your inquiry, I beg to say that if any person on any vacant ground within the "District of Lake Michigan" violates any provisions of the city ordinances, or commits any offense against the criminal laws of the State, that person is liable to arrest in just the same way that he would be if he

were in any other part of the city. Our opinion of October 27th, 1904, has already discussed at considerable length the circumstances under which the carrying of arms, exposed or concealed, is a violation of the law.

I am informed that the "District of Lake Michigan" is enclosed by fences and that the ownership of said land is claimed by various parties who are in possession of the same. If, therefore, Niles and his men attempt to go upon said lands, such attempt would constitute a forcible entry. Forcible entry is expressly prohibited by our statute.

"No person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner." (Hurd's Stat., 1903, p. 992, Ch. 57, Sec. 1.)

It thus appears that a forcible entry would be an unlawful act. It has been expressly held that "Any entry is forcible which is against the will of the occupant. Actual violence not necessary." (*Croff v. Ballinger*, 18 Ill., p. 200.)

Although the statute quoted does not make forcible entry a criminal offense, and does not specify any penalty for its violation, still a forcible entry in violation of the statute would constitute disorderly conduct.

Disorderly conduct has been defined to be "Any conduct which is contrary to law." (5 Am. & Eng. Enc. of Law, p. 692, and cases there cited.)

Moreover, an attempt to take possession of the lands in question by an armed force would undoubtedly constitute disorderly conduct within the meaning of Section 1,287 of the Revised Code of Chicago of 1897, as amended by ordinance passed December 21st, 1903 (Council proceedings, p. 1883).

It follows from what has been above said, that it is your duty to prevent the persons in question from taking forcible possession of the lands in question, and to arrest them if they persist in attempting to do so.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

NOVEMBER 12, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter enclosing application of the Joliet and Chicago Railroad Company for a permit to construct a railroad track extending to the property of the C. A. Fisher Mattress Warehouse, as shown by dotted lines on the accompanying plat.

The ordinance of January 8, 1857, authorizes this company to introduce its railroad on Archer avenue, and through Grove street, and to use so much of said streets as may be necessary for the purpose of constructing, maintaining and using a single or double track railroad through said streets, with such turnouts and branches extending to adjoining lands as may be deemed necessary for the successful use and operation of said road, and expressly provides that the company "shall afford all necessary facilities to the owners of property in said streets for doing business on said road, by putting in sidetracks necessary for such purposes, and to operate said tracks so as to carry the cars of said road."

The ordinance provides that upon its acceptance within the time fixed, a contract shall be executed between the city and the company, having the same provisions that are contained in the ordinance. We have made search for this contract but have been unable to find any trace of it, and are informed that the company is not able to find any copy or trace of one.

While it is a matter of some doubt whether the company has not exhausted its power under the ordinance, we are inclined to the opinion that the duty imposed upon the company by this ordinance, affording facilities to owners of abutting property, is a continuing duty, and, therefore, there is no legal objection to the issuance of the desired permit.

Herewith we return the application.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved.

WM. H. SEXTON,

Acting Corporation Counsel.

NOVEMBER 16, 1904.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

Under date of November 24, 1904, you requested this department to advise you whether or not you have authority to compel the owner of an old building, built presumably in conformity with the building ordinance of twenty years ago, to increase the height of his chimney to the height required by the present ordinance, which provides that "All chimneys having a greater area than nine hundred square inches shall be carried to a height of at least twelve feet above any roof within a radius of sixty feet."

The provision just quoted is found in Paragraph 4 of Section 127 of the present building ordinance.

It must be construed in connection with Section 160 of the building ordinance, which provides that "Except in cases where the immediate safety of the occupants of buildings is concerned, nothing in this ordinance shall be considered as requiring alteration in the construction or equipment of buildings existing at the time of the passage of this ordinance and at that time complying with the ordinance at that time in force."

Each succeeding revision of the building ordinances has contained a clause substantially similar to that last above quoted. Assuming, therefore, that the building in question and its chimney were erected in conformity with the building ordinances in force at the time of erection, I am of opinion that you cannot require the owner now to increase the height of his chimney, unless "the immediate safety of the occupants of buildings is concerned."

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

NOVEMBER 16, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Returning herewith the application of the Union Stock Yards & Transit Company and the Chicago Junction Railway Company for permit to replace the "Y" connection between their tracks and the tracks of the Lake Shore & Michigan Southern and the Chicago, Rock Island & Pacific Railroad Companies in the northeast angle of the crossing of the tracks of said companies, as shown on the blue print accompanying said application, I beg to state that the track in question was originally laid a number of years ago, presumably, under authority granted by the trustees of the Town of Lake, and was removed when the grade of Armour avenue was lowered. It is now desired to relay this track temporarily for the purpose of gaining access to vacant property lying between Armour avenue and the Lake Shore & Michigan Southern Railway and between 39th street and the Chicago Junction Railway, which it is desired to use for the purpose of storing materials to be used in the work of elevating the tracks of the Union Stock Yards & Transit Company and the Chicago Junction Railway Company. The track elevation ordinance passed March 16, 1903 (page 2704 of Council proceedings, 1902-3), recognizes the right of these companies to replace this "Y" connection, but provides that a subway shall be constructed in Armour avenue underneath such "Y" connection, and of course that the same should be completed within the time limited in the ordinance, which is December 31, 1906. It is also provided in and by Section 11 of said ordinance (page 2711, Council proceedings) that:

"Said companies, whenever the same shall be necessary in the prosecution of the work which they are herein authorized or required to perform, may obstruct temporarily, any public street, avenue or alley to such extent or for such length of time as may be approved by the Commissioner of Public Works."

In my opinion, there is no objection to your granting a permit to these companies for the replacing and maintenance of this "Y" connection, for such a period as you may think

proper, but the permit should specify that the subway under said "Y" connection must be completed not later than December 31, 1906.

Yours very truly,
WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

NOVEMBER 16, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Returning herewith the application of the Union Stock Yards & Transit Company for permit to "rearrange tracks in accordance with blue print hereto attached," I beg to say that this appears to be an application for permit to lay a new track connecting with the existing track of said company on Emerald avenue.

The application states that it "is made under ordinance in favor of the U. S. Y. & T. Company, passed by the Town of Lake on July 29, 1871." Undoubtedly, the ordinance of August 29, 1871, is meant, as I am unable to find any such ordinance dated July 29, 1871.

A careful examination of said ordinance of August 29, 1871, fails to disclose any authority for the laying of the track in question; that ordinance simply gives the "right to lay a single railroad track on the center line of Emerald avenue."

I am therefore of the opinion that the application should be denied.

Yours very truly,
WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

NOVEMBER 17, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have your communication relative to the repairs and construction of a sidewalk on Polk street viaduct and its approaches and on the Ogden avenue viaduct and its approaches.

The opinion of the Corporation Counsel, rendered May 20, 1904, plainly refers to the Ogden avenue viaduct, whereas your letter of August 24th to the Pennsylvania lines has reference to the Polk street viaduct. So far as I see, it makes no difference as to which of these viaducts the opinion of the Corporation Counsel be applied, as the legal obligation of the company to construct and maintain proper and safe sidewalks along the sides of the approaches to the viaduct is the same in either case. I will say, regarding the Ogden avenue viaduct, that upon the request of Alderman Zimmer an order has been prepared for introduction into the council, notifying the companies operating lines of railroad under the Ogden avenue viaduct of the exact nature of the repairs required to be made with regard to the sidewalks on the direct and lateral approaches to this viaduct, together with the estimate of the cost of these repairs, and upon the passage of this order, steps will be taken by this department to compel these railroad companies to comply with the order. Should the corporations operating railroads underneath the Polk street viaduct refuse to construct and maintain suitable sidewalks along their approaches, steps can be taken in accordance with the opinion of the Corporation Counsel herein referred to, with a view to forcing these corporations to repair the sidewalks necessary. If it be true, as stated in the letter of counsel for the Pennsylvania lines that the facts applicable to the Ogden avenue viaduct are not so to the Polk street viaduct, this department has no information upon this point, and would be pleased to have the counsel for the railroad com-

pany point out any distinction between the facts applicable to one and not to the other viaduct.

Very respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

NOVEMBER 17, 1904.

CLARENCE KNIGHT, Esq.,

President Lake Street Elevated Railroad Company.

Dear Sir:

There has been forwarded to this department by the Commissioner of Public Works, a communication from Mr. Francis Leon, who resides at No. 7 S. Kedzie avenue, in this city, in which communication Mr. Leon complains of the practice of your road in storing cars on your structure between Kedzie and Homan avenues.

I, of course, need not inform you that the storage of cars upon the elevated structure of your company, by reason of which the light is cut off from the street below, is illegal, and not permitted by the terms of the ordinance under which the Lake Street Railroad was constructed and is now being operated. The structure is to be used solely for the purpose of transporting passengers for hire in cars.

If the practice to which I have referred above still obtains on the part of the employes of your company, I ask that you take the necessary steps to discontinue it.

Very respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

NOVEMBER 18, 1904.

FRANK I. BENNETT, ESQ.,

Chairman of Committee on Finance of the City Council.

Dear Sir:

I have your letter of the 17th inst. to the Corporation Counsel as follows:

"This committee has under consideration various propositions for the disposal of garbage. Among others there is one by the terms of which a company proposes to erect at its own expense a suitable plant for the disposition of garbage. The plant is to be built as stated at the expense of the company, and the company is to receive the garbage and dispose of it free of cost to the city.

"Will you please advise the committee whether under such conditions we can lawfully make a contract by which the city will bind itself to give this garbage to the company for a term of years.

The city will collect the garbage and deliver it on cars or at such other place as it may determine from time to time, the expense of such collection to be provided for annually."

The only proposition that requires present attention is: Can a municipality make a contract by which it binds itself for a term of years to deliver to the other party to the contract the garbage which the municipality has itself collected, without any cost or expense to the municipality for the removal and disposal of the garbage by such other party? On this general proposition I am of the opinion that there is no legal objection to the city making a contract of this character. It will of course be necessary for the contract to be made after advertisement and bid, as it might be well claimed that garbage so collected and delivered to a concern operating a reduction plant is a more or less valuable asset of the municipality.

Very truly yours,

WM. H. SEXTON,
Acting Corporation Counsel.

NOVEMBER 19, 1904.

CHARLES WERNO, Esq., Chairman Judiciary Committee of the
City Council.

Dear Sir:

April 6th, 1904, this department furnished to the Mayor an opinion as to the validity of an ordinance licensing persons who desired to vend patent medicines, since which said date it has been suggested that the ordinance in question would be invalid because of the provisions contained in Section 8 of an act entitled "An Act to Regulate the Practice of Medicine in the State of Illinois and to Repeal an Act therein named," in force July 1st, 1899 (Hurd's Rev. St., 1903, p. 1233). Said Section 8 of said act reads as follows:

"CERTIFICATE TO BE RECORDED—PENALTY.—Sec. 4. Every person holding a certificate from the State Board of Health shall have it recorded in the office of the Clerk of the county in which he resides or practices within three months from its date, and the date of the recording shall be endorsed thereon. Until such certificate is recorded, as herein provided, the holder thereof shall not exercise any of the rights or privileges conferred therein. Any person practicing in another county shall record the certificate in like manner in the county in which he practices, and the holder of the certificate shall pay to the County Clerk the usual fee for making the record. The County Clerk shall keep, in a book provided for the purpose, a complete list of the certificates recorded by him, with the date of the issue of the certificate. The register of the County Clerk shall be open to public inspection during business hours."

It will be observed from the language of the above section that the State Board of Health is given power, for sufficient cause, to refuse a license to itinerant venders of drugs, but inasmuch as there is nothing in the act in question indicating what would constitute a sufficient cause for the refusal of a license, it seems to me the indefinite power vested in the State Board of Health renders the entire section invalid under the rule laid down in the case of *Noel v. The City*, 187 Ill., 587, which declared certain parts of the State Pharmacy Act of 1895 invalid.

I would call your attention to the fact that the ordinance drafted by this department relates exclusively to patent and proprietary remedies, and does not deal generally with the subject of medicine or pharmacy. Section 1 of the State Pharmacy Act, approved May 11th, 1901, and in force July 1st, 1901 (Hurd's Rev. St., 1903, p. 1235) provides that nothing contained in that act shall apply to the sale of patent or proprietary preparations when sold in original and unbroken packages. I would suggest that the question of conflict between the proposed ordinance and the statutes of this State might be very clearly settled by inserting in the ordinance an additional section, to read as follows:

"Provided that this ordinance shall not apply to any drug store or pharmacy where drugs, medicines or poisons are compounded, dispensed, or sold at retail, and which are conducted under the provisions of 'An Act to Regulate the Practice of Pharmacy in the State of Illinois,' approved May 11th, 1901, and in force July 1st, 1901."

I think the ordinance with this amendment will be valid and within the power of the city to adopt, for the reasons contained in the opinion addressed to the Mayor.

Yours very truly,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

Acting Corporation Counsel.

NOVEMBER 26, 1904.

CHARLES ALLING, ESQ.,

Chairman Sub-Committee on Rendering of the
Judiciary Committee of the City Council.

Dear Sir:

I have a communication from you of November 22d, 1904, requesting this department to prepare an ordinance in conformity to a decision of the sub-committee of the Judiciary Committee, on rendering.

The ordinance you request, according to your communication, shall prohibit the rendering of animal and vegetable

matter independent of slaughtering from and after a period of five years from the passage of the ordinance, within the city limits; with the proviso that rendering of animal matter may be done at all times within the city limits as and incident to slaughtering, and if done upon premises immediately adjacent to those on which slaughtering is carried on; and with the further proviso that the rendering contemplated in the foregoing proviso shall be only of such a character as shall include the rendering of matter produced by the slaughtering plant where such rendering is done.

Your communication contains the further request to prepare another section of the ordinance which will permit rendering in the general stock yards district independent of slaughtering, but without making said district a rendering district.

Considering the question first, of whether a valid ordinance can be drawn which excludes from the city limits after five years from the date of its passage, the business of rendering animal and vegetable matter, independent of slaughtering.

Rendering is the trying out or extracting (oil, lard, tallow, etc.) from fatty animal substances; or, as defined by our present ordinances, the changing of the form of animal matter by the use of heat, steam, fire, chemicals, or otherwise. The process of rendering is employed by soap factories, glue factories, gut cleaning establishments and other manufactories in the city. I have no facts before me which tend to show that the rendering of animal or vegetable matter connected with the slaughtering business is likely to be less of a nuisance than the rendering of animals and vegetable matter unconnected with the slaughtering business. On the contrary, from repeated conferences with the Commissioner of Health and the Secretary of the Health Department, I have gained the impression that it cannot be said as a matter of law that the rendering of animal and vegetable matter connected with a slaughter house is not a nuisance *per se*, and that the rendering of such matter unconnected with a slaughter house is such a nuisance. These questions must depend upon the facts in each case, and it is entirely possible that a rendering plant which had no connection with a slaughter house might render

animal and vegetable matter in just as inoffensive a manner as one where slaughtering is carried on. Such being the case, an ordinance giving the right to a slaughter house to render animal or vegetable matter, while denying such right to other establishments which may be in the conduct of such rendering business as little noxious and unsanitary as a rendering plant connected with a slaughter house, would be, in my opinion, class legislation, unequal in its effects on the different branches of the same trade, discriminatory in favor of rendering plants connected with slaughter houses, tending to create monopolies for rendering plants connected with slaughter houses, and consequently illegal and invalid.

The objections which I have noted with respect to the first part of your ordinance apply with equal force to the proviso that rendering of animal matter may be done at all times in the city as an incident to slaughtering, and on premises immediately adjacent to those on which slaughtering is carried on, and that such rendering shall be limited to the matter produced by the slaughtering plant. It cannot be laid down as a matter of law that material produced by a slaughtering plant and rendered, is less offensive than, for instance, material which might be rendered across the street from a slaughtering plant and conveyed to the rendering plant from the slaughtering plant. This proviso also, I consider it impossible to embody in an ordinance without destroying its legality.

Concerning your suggestion that I prepare an ordinance designating a section which will permit rendering in the general stock yards district, independent of slaughtering, but without making a distinct rendering district, I have no information, nor do I think it possible to obtain such, as to what at present constitutes the "general stock yards district", and even if I were familiar with the boundaries of this district, I am of the opinion that to permit rendering therein by ordi-

nance would be impossible without in direct terms creating of it a rendering district.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 1, 1904.

MILTON J. FOREMAN, ESQ., Chairman Committee on Local
Transportation of the City Council.

Dear Sir:

Your committee has referred to this department the order introduced by Alderman Cullerton looking to the arrangement of the plan for the transportation of passengers on Ashland avenue from one end of the street to the other for a single fare, issuing transfer first to accomplish the same between the Union Traction Company, the Chicago General Railway Company and the Chicago City Railway Company.

The Chicago General Railway Company is operating a street railway line on Ashland avenue between Twenty-second and Thirty-first streets. This line crosses the Chicago River from the west division to the south division, and its termini may also be stated as from Blue Island avenue to Archer avenue. Said line was constructed by the Chicago General Railway Company under an assignment of an ordinance to the West Chicago Street Railroad Company, dated July 27th, 1896, for a term of twenty years (Special Ordinances, page 1661). It should be carefully noted at this point that an ordinance covering the same territory, passed June 28th, 1897, to the Chicago General Railway Company for a term of twenty years was vetoed. Through some error this fact was overlooked by the compiler of the volume of Special Ordinances of 1897, and said ordinance was inserted therein at page 2175 thereof, and some confusion has arisen on account of this mistake.

That part of Ashland avenue directly north of the line of the Chicago General Railway Company last above referred to is occupied by tracks constructed and operated under an

ordinance of March 21st, 1892, to the West Chicago Street Railway Company, the duration of which is twenty years (Special Ordinances, page 1636).

That part of Ashland avenue directly south of said Chicago General Railway Company's line is occupied by tracks constructed and operated under an ordinance dated May 26th, 1884, to the Chicago City Railway Company, with a duration of twenty years from July 30th, 1883 (Special Ordinances, page 1093). Said ordinance expired July 30th, 1903, but has been extended to December 31st, 1904.

It will therefore be observed that all three sections of the line of Ashland avenue above referred to are operating under existing ordinances, the terms of which have not expired, and that the case is materially different from that of certain Union Traction lines which are being operated after their expiration under the protection of an injunction.

The question propounded to this department is whether or not the exercise of the city's police power or the making of an arrangement by contract for transfers between the three companies under consideration, so as to authorize the transportation of passengers for a single fare over all of the lines mentioned in said three ordinances, will prejudice the city's position in its pending ninety-nine year act litigation.

I think the facts above stated clearly furnish an answer in the negative to this inquiry. So long as the companies are rightfully operating upon these streets under ordinances which have not yet expired, the city may either contract with relation thereto or exercise its police power without in any way prejudicing its rights in regard to other lines of said companies concerning which there may be some controversy. While the exercise of the police power as to expired lines would be inconsistent with the city's contention that the right to operate said lines had expired, no such deduction can follow from lines the ordinances for which have not expired. So long as the ordinance-rights exist, the city may exercise its power without assuming any inconsistent attitude.

It will clearly appear, however, from what has been said, that if the City Council is to exercise any police power in the premises, it should be exerted as to the Chicago City Railway

Company before the thirty-first day of December. After that date the city cannot exercise such power without assuming an inconsistent position in regard to said line.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 1, 1904.

CHARLES ALLING, Esq.,

Chairman Committee on State Legislation.

Dear Sir:

In answer to the request of your committee that the Corporation Counsel give an opinion upon the nature and scope of the amendment to the State Constitution adopted at the last election, and upon the extent and limits of the power of the legislature thereunder, I beg leave to say:

Preliminary to all other questions there arises first of all the question of the validity of the amendment. This question is not new, but the passage of the amendment brings it forward again for consideration.

Section 2 of Article XIV of the Constitution contains the following language:

“The General Assembly shall have no power to propose amendments to more than one article of this Constitution at the same session.”

It has been suggested that the said amendment offends against this constitutional provision, in that it amends by implication several articles of the Constitution. I think that this objection is not well taken. The language above quoted makes no reference to amendment by implication, but prohibits the General Assembly from *proposing amendments* to more than one article. The amendment in question is not “proposed to more than one article.” On its face it is distinctly confined to the amendment of Article IV of the Constitution. When proposed it was proposed as an amendment to that article and that article alone. Even if the amendment should so operate as to amend other articles by implication, I do not believe that such mere incidental or implied amendment is embraced within the meaning of the lan-

guage above quoted from Article XIV. It seems to me that it would be very difficult indeed to draw an amendment to any one of the important articles of the Constitution without thereby in some manner modifying, affecting and therefore amending by implication other articles. If the framers of the Constitution intended to guard against the proposing of an amendment which should not even amend by implication more than one article, they would certainly have used apt language to make such an intention clear.

In addition to the suggestions which I have just made, I beg leave to call your attention to a very convincing opinion on this point, prepared for the new charter convention by eminent jurists and able counsel learned in the law—Judges Tuley, Adams and Haney and Messrs. Wilson, Hamline, Shope, Wall, Moran, Miller, Andrews, Aldrich—which opinion most carefully discusses the question of the constitutionality of the amendment under the provisions of Article XIV, cites many cases and reaches the conclusion that the amendment under discussion does not offend against the provisions of the Constitution above referred to contained in Article XIV thereof.

It may, perhaps, be proper, before closing the discussion of this branch of the case, to call your attention to a well-established principle of law which is uniformly applied by the courts in the construction of statutes when questions arise as to their constitutionality. If in such case a statute is susceptible of two constructions, one of which would render it obnoxious to the provisions of the Constitution and the other of which would render it free from such criticism, the court will adopt that construction which leaves the act in harmony with the Constitution. (*Dement v. Rokker*, 126 Ill. 174 (190); *Hogan v. Aiken*, 181 Ill. 448 (453)). In any question which may be raised, therefore, in regard to the constitutionality of the joint resolution proposing said constitutional amendments, it is quite certain that instead of pronouncing the resolution and amendment void as constituting amendments of more than one article of the Constitution, the court would so construe the language of the resolution and amendment as to limit its effect to the amendment

of a single article, and thus carry into effect the will of the legislature and of the people, so far as the expression of that will is in harmony with the fundamental law of the State. This I believe to be the *extreme limit* to which the courts would sustain objections to the constitutionality of the amendment. If so, the worst that can happen is to confine us, under this amendment, to legislation for Chicago which does not run counter to the provisions of other articles of the Constitution. While I do not believe that said constitutional objection has any weight whatever, yet it is always prudent to fairly consider the result of the most adverse decision which the courts may render. I shall therefore discuss the extent and limits of legislative power, under this amendment from two points of view, to-wit, first as though the constitutional objection above referred to were without merit; second, as though it were good to the extreme limit above stated.

An analytical examination of said constitutional amendment shows that it contains both grants of power and limitations upon the grants.

The grants of power are to the General Assembly and are three in number, to-wit:

(a) "To pass any law (local, spécial or general) providing a scheme or charter of local municipal government for the territory now or hereafter embraced within the limits of the City of Chicago."

(b) "And in case the General Assembly shall create municipal courts in the City of Chicago it may—

(1) Abolish the offices of justices of the peace, police magistrates and constables in and for the territory within said city, and may—

(2) Limit the jurisdiction of justices of the peace in the territory of said County of Cook outside of said city to that territory, and—

(3) In such case the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe."

(c) "And the General Assembly may pass all laws which it may deem requisite to effectually provide a complete

system of local municipal government in and for the City of Chicago.”

Clause (a), *supra*, is the broad statement of the general grant of power and is followed by six subdivisions, all of which are embraced within the language which I have quoted in clause (a), but none of which may be exercised except by the passage of laws “providing a scheme or charter of local municipal government for Chicago.” These subdivisions of clause (a) may be classified as follows, and in this classification, for the sake of accuracy, I now use only the language of the constitutional amendment:

“The law or laws so passed may provide:

(a-1) “For consolidating (in whole or in part) in the municipal government of the City of Chicago the powers now vested in the city, board of education, township, park, and other local governments and authorities having jurisdiction confined to or within said territory or any part thereof.

(a-2) “And for the assumption by the City of Chicago of the debts and liabilities (in whole or in part) of the governments or corporate authorities whose functions within its territory shall be vested in said City of Chicago.

(a-3) “And may authorize said city, in the event of its becoming liable for the indebtedness of two or more of the existing municipal corporations lying wholly within said City of Chicago, to become indebted to an amount (including its existing indebtedness and the indebtedness of all municipal corporations lying wholly within the limits of said city, and said city’s proportionate share of the indebtedness of said county and sanitary district, which share shall be determined in such manner as the General Assembly shall prescribe) in the aggregate not exceeding five percentum of the full value of the taxable property within its limits, as ascertained by the last assessment either for State or municipal purposes previous to the incurring of such indebtedness (but no new bonded indebtedness other than for refunding purposes shall be incurred until the proposition therefor shall be consented to by a majority of the legal voters of said city, voting on the question at any election, general, municipal or special).

(a-4) "And may provide for the assessment of property and the levy and collection of taxes within said city for corporate purposes in accordance with the principles of equality and uniformity prescribed by this Constitution.

(a-5) "And may abolish all offices the functions of which shall be otherwise provided for."

(a-6) "And may provide for the annexation of territory to or disconnection of territory from said City of Chicago by the consent of the majority of the legal voters (voting on the question at any election, general, municipal or special) of said city and of a majority of the voters of such territory, voting on the question at any election, general municipal or special."

The subdivisions which I have made of clause (a) amount to the grant of power to the legislature for the enactment of a scheme or charter of local municipal government for Chicago. This charter may legislate upon six subjects, and for the sake of brevity I now restate these six subdivisions more concisely than it was possible to do by the method of quotation above employed:

(1) Consolidation of certain taxing bodies.

(2) Assumption by Chicago of the debts of the taxing bodies thus consolidated.

(3) Increase of the borrowing power.

(4) The institution of a new law for the assessment of property and the levy and collection of taxes within the city.

(5) The abolition of offices as a result of consolidation.

(6) The annexation of territory by and with the consent of the annexed territory.

It should be noted:

That in the enumeration of the municipalities which may be consolidated, the county and the drainage board are omitted;

That the increase of the borrowing power of the city is conditioned upon consolidation and the assumption of the debts of the consolidated municipality;

That the authority for a new tax law is limited to the territory of the city;

That the authority for the abolition of offices is lim-

ited to those functions for which provision shall be otherwise made.

And that the annexation of territory is limited by the necessity of a special referendum on the question of annexation to be voted for in both jurisdictions, the city and the territory proposed to be annexed.

Clause (b), *supra*, is somewhat peculiar and its language requires close attention.

It has been considered to be a grant of power to the General Assembly to create municipal courts, but this assumption is not borne out by the text of the amendment. The language is, "and *in case* the General Assembly shall create municipal courts, it may abolish," etc. This clause is a mere statement of the condition upon which the General Assembly may exercise the powers thereafter enumerated, which are:

(1) The abolishment of the offices of justice and constable within the city;

(2) The limitation of the jurisdiction of justices in territory of this county outside of the city, and

(3) The declaration that the jurisdiction and practice of such municipal courts may be prescribed by the General Assembly.

The power to create municipal courts for the City of Chicago must, therefore, be derived, not in the first instance from this constitutional amendment, but from the broad and ample general powers of the legislature over the subject-matter expressed in other provisions of the Constitution and from other legislative enactments, for example: the Act of 1901, entitled "An Act in relation to Courts of Record in Cities," providing for the establishment of "city courts" may, in my judgment, be amended so as to entirely fit the needs of the present occasion. Either of these courses being pursued, the abolition of the offices of justice and constable within Chicago, the limitation of the jurisdiction of Cook County justices and constables outside of Chicago, and the establishment of rules of jurisdiction and practice for said court applicable to Chicago alone, are amply supported by those provisions of the constitutional amendment which I have quoted under the three subdivisions of clause (b), *supra*.

This seems to me to be the proper place to say that the failure to give power for the establishment of municipal courts through this constitutional amendment was no oversight, but marks emphatically the sagacity of those who drew the instrument, and was intended to prevent a conflict between the provisions of Article IV of the Constitution as amended, and those of Article VI, entitled "Judicial Department." It tends strongly to support the conclusion which I have reached, that this amendment in its present form does not constitute an amendment of more than one article of the Constitution.

Clause (c), *supra*, needs but little discussion. It has already been quoted at length above and need not now be repeated. It is but a re-statement in other, and I think broader, language of the rights conferred by clause (a) and the six subdivisions thereof already set out at great length. It may not, however, be out of place to emphasize one phrase, namely: "and the General Assembly may pass *all laws* which it may deem requisite," etc. I think this language, following, as it does, similar language quoted in clause (a), where the term "any law" was used, answers two questions which have arisen recently. I think this closing paragraph was not inserted without a purpose. I believe that it grants a continuing power to the legislature, not only to enact one general scheme of laws or charter, but to pass as many laws as it may "deem requisite", and to divide its task of the creation of a charter for the City of Chicago into separate and independent acts; that it is not compelled to finish its task by the exercise of one legislative act, but that it may proceed from time to time, acting as often as necessary, until the whole task is finished. Each of such acts, of course, must be submitted to the people for their ratification and approval, and when approved, cannot be amended by the legislature without a similar referendum.

I have heretofore discussed the extent and limitations of legislative power under said constitutional amendment as though said amendment was not in conflict with the provisions of Article XIV of the Constitution. I shall now proceed to discuss it as though the constitutional objections above

referred to were valid to the extreme limit above defined, namely, that said constitutional amendment should be so strictly construed as not to authorize any legislation which should be in conflict with the provisions of any other article of the Constitution than Article IV thereof.

The only articles of the Constitution which have ever been suggested as likely to affect this question, in addition to Article IV, are Article VI, Judicial Department; Article IX, Revenue, and Article X, Counties. I have carefully examined all the other articles of the Constitution and am unable to see that any legislation providing a charter of local municipal government for Chicago could possibly come within the purview of any other articles than those above enumerated. Article VI provides as follows:

“Section 1. The judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, Circuit Courts, County Courts, Justices of the Peace, Police Magistrates and such courts as may be created by law in and for cities and incorporated towns.”

Nothing in the constitutional amendment or in the proposed legislation for the creation of municipal courts conflicts with the above quoted section of the Constitution, because municipal courts come clearly within the meaning of the words “such courts as may be created by law in and for cities.”

Sections 2 to 20 deal with the Supreme, Appellate, Circuit, County and Probate Courts. Section 21 reads as follows:

“Justices of the peace, police magistrates and constables shall be elected in and for such districts as are or may be provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform.”

Nothing in the last quoted section conflicts with the provisions of the amendment for the abolition of justices and constables in Chicago because the Constitution simply requires such officers to be elected “in and for such districts as are or may be provided by law.” The proposed law for the abolition of justices and constables may be so framed that in

Chicago there will be no district where the election of justices and constables is provided for by law.

Sections 23 to 28, inclusive, deal with the courts of Cook County, and what has been already said with regard to the general provisions of Article VI apply without repetition to the similar provisions contained in Sections 23 and 28 in Article VI in regard to Cook County alone. The question may arise on Section 28, if the constitutional objection now under discussion is upheld to its full extent, as to whether or not the abolishment of justices of the peace can take effect until the end of their several present terms of office. The remainder of Article VI contains general provisions which clearly are not in conflict with the constitutional amendment or the proposed legislation thereunder.

Article IX of the Constitution refers to revenue. To discuss all its provisions would unreasonably prolong this opinion. I have carefully examined all of the sections of said article and should not hesitate to assert, but for the *Fishburn case*, 189 Ill. 377, that a statute increasing the borrowing power of the city to five per centum on the full assessed value of the taxable property therein is not in contravention of Section 12 of said Article IX. What is said in that case apparently *contra* to this conclusion arose on a state of facts very different from the facts upon which this question would arise under the amended Constitution, and I believe that the *Fishburn case* would be distinguished or modified. However this may be, I have no doubt that the passage of an act modifying for Chicago the unforeseen and unfortunate effect of the Juul law, so as to prevent the scaling down of the present two per cent. limit to one and one-half per cent. of the one-fifth assessed value of taxable property in the city would not conflict with the provisions of said article. Indeed, as a mere question of law, increase of the city's taxing power to two per cent. of the full assessed value of property would not conflict with any of the provisions of Article IX of the Constitution, but since any material increase in the rate of taxation for general corporate purposes is not proposed, or if proposed would undoubtedly be defeated by the people at the polls, that question may be dismissed without further

consideration. If the legislature undertakes to create new machinery for the assessment and collection of taxes, so long as said taxes are levied upon property in proportion to its value, such taxes to be uniform in respect to persons and property, the mere employment of new machinery for this purpose would not conflict with any of the provisions of Article IX.

It was suggested at one time that the amendment would conflict with the provisions of Article X in regard to counties, but since the resolution as originally offered was amended by striking out the clauses for the consolidation of the county with the city, the question of possible conflict with Article X may be dismissed without further consideration.

To summarize this branch of the discussion: Even if the constitutional objections should be sustained to the fullest extent to which, under the established current of authority, such objections may be sustained by the courts, I am firmly of the opinion that the amendment itself would not be void or inoperative, but would merely be construed as authority to pass those laws only which did not conflict with other provisions of the Constitution; and after an examination and enumeration of the subjects upon which legislation is authorized by the constitutional amendment, I am of the opinion that on each and every one of said subjects laws could be enacted providing satisfactory governmental machinery for the City of Chicago without producing any conflict with any other portion of the Constitution of the State.

It is no part of my province to advise your committee upon questions of policy. My duty is limited to the consideration of questions of law, and yet there is one question of policy so intimately connected with questions of law that I feel bound briefly to discuss it.

It must be apparent from what has already been said that the question of conflict between the constitutional amendment under consideration and the provisions of Article XIV prohibiting the proposals of amendments to more than one article has an intimate and direct relation to the character of the legislation which may be enacted under the authority of the amendment; that is to say, in the last analysis the

question will be—not, was the *amendment* constitutional, but, is the *legislation* in conflict with the Constitution?

However confident we may be upon these constitutional questions, it must be remembered that they will arise and must be decided by the courts. The probability is that before any additional bonds are sold under the authority of this amendment and the new charter, the question of the validity of those bonds must be determined by test suit taken to the Supreme Court of Illinois. It is therefore of the utmost importance for the very life of the charter project that this legislation should be as plain and simple as possible; that it should not enter upon the field of doubtful experiment, but that it should be confined to curing those provisions of our present charter which experience has shown to be defective and unsatisfactory.

A new charter, which should be a mere amendment of the present Cities and Villages Act, limited, of course, in its effect to this city, making changes in those provisions which experience has demonstrated should be changed, and adding thereto only those provisions which experience has shown are indispensably necessary, leaving the general frame of the act unchanged and preserving the greatest possible harmony between those provisions applicable to Chicago and those applicable to the rest of the State, would, in my opinion, present an entirely safe legislative program and one which, in my opinion, would without hesitation be sustained by the courts. A similar method treatment of the Revenue Act and of the act "in relation to courts of record in cities" would present in the safest possible way a legislative program for revenue reform and for the abolition of the justice court evil. As a first step I believe that the amendment of three existing acts, to-wit: the Cities and Villages Act, the Revenue Act and the City Court Act, could be so framed as to afford us nearly, if not quite all, the changes which are in any way available under the constitutional amendment, and that the adoption of this plain and simple course would not only result in legislation more certain to be sustained by the courts, but by limiting for the present the scope of the discussion, would be likely to procure most easily that necessary con-

cord among the various interests, which is an indispensable prerequisite to the passage of any new charter.

Very respectfully submitted,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 5, 1904.

TO THE HONORABLE, THE CITY COUNCIL.

Gentlemen:

June 27, 1904, the Mayor transmitted to you by his letter of that date the opinion of the same date of the Corporation Counsel in regard to the failure of the Chicago General Railway Company to operate its line on Ashland avenue between Blue Island avenue and Thirty-first street, other than by occasional and desultory operation of what had become known as "Ghost Cars", operated not for public service, but for the purpose of attempting to preserve a franchise; and also an ordinance declaring a forfeiture of an ordinance, authorizing the Chicago General Railway Company to construct and operate on said street, passed June 28, 1897 (see p. 602, current Council proceedings).

July 11, 1904, the Mayor transmitted another letter on the same subject matter and therein stated that the Chicago General Railway Company claimed the right to operate upon said street by virtue of an ordinance to the West Chicago Street Railway Company, passed July 27, 1896, accepted August 1, 1896, and printed at page 1661 of special ordinances of the City of Chicago, known as Vol. II of the Code; that the rights under said ordinances were leased by said West Chicago Street Railway Company to said Chicago General Railway Company and the tracks constructed by the latter company.

At the suggestion contained in said letter your honorable body passed an order directing the Commissioner of Public Works to issue a permit to the Chicago General Railway Company authorizing it to complete the construction of the road so as to operate the same commensurate with the demands of the public (see page 826, et seq., current Council proceedings). The ordinance of June 28, 1897, authorizing

the Chicago General Railway Company to construct a street railway and operate in certain streets, among them being Ashland avenue from 22d street to Archer avenue, never became effective for the reason that it was vetoed by the Mayor, July 6, 1897 (see page 531, Council proceedings, 1897-8).

Since my opinion of June 27, 1904, I have learned that the Chicago General Railway Company did in fact construct its road on Ashland avenue between Blue Island avenue and 31st street under the authority granted by the ordinance to the West Chicago Street Railway Company July 27, 1896, and printed at page 661 of the special ordinances. The permit was issued September 7, 1899, by the Commissioner of Public Works authorizing the construction of said road under said ordinance. Said permit is as follows:

“September 7, 1899.

“Doc. No. 5824.

“In pursuance of an ordinance passed by the City Council July 27, 1896, granting certain rights and privileges to the WEST CHICAGO STREET RAILROAD COMPANY, permission is hereby granted to the CHICAGO GENERAL RAILWAY COMPANY, the successor to the rights of said first mentioned company on the street mentioned below, to lay down, construct, maintain and operate a double track electric street railroad on and along Ashland avenue between the northwesterly line of Blue Island avenue and the south line of 31st street; also to connect at the street intersection at 31st street with the tracks now laid from said 31st street south on said Ashland avenue; also to connect at the street intersection at Blue Island avenue with the tracks now laid on 22d street.

“This permit is issued and accepted upon the condition that the said street railroad, together with all necessary poles, wires and fixtures for the sustaining of the trolley wires of said company on the said street, shall be constructed in accordance with and shall be maintained subject to all the conditions, stipulations and requirements of the ordinance hereinbefore mentioned, to all orders and ordinances which have been or which may be passed by the City Council pertaining to the same, and to all orders of the Commissioner

of Public Works; and upon the further express condition that said company shall bond every rail joint with two No. 00 bonds, each connection to be entirely separate from the other.

“The said work shall be done under the supervision and inspection of the Department of Public Works, for which the said company shall pay to the City of Chicago all cost of the same; and said company shall give the said department forty-eight hours’ notice before commencing work under this permit.

“The said work shall be completed within sixty days from the date hereof, and in case the same shall not have been completed before the expiration of said period, then this permit shall be null and void.

“This permit is revocable by the Commissioner of Public Works at any time for cause.

“L. E. McGann,

“Commissioner of Public Works.

“Countersigned:

“Edward B. Ellicott,

“Superintendent of City Telegraph.”

I have called on the Chicago General Railway Company to produce the lease which it claims to have from the West Chicago Street Railway Company transferring the latter’s rights under said ordinance of July 27, 1896, but find that no lease was ever executed. There was, however, an agreement reduced to writing between the companies which might be said to operate as a transfer of the West Chicago Street Railway Company’s rights under said ordinance to the Chicago General Railway Company. However the fact may be in that regard, I am of the opinion that the city having issued said permit and at that time recognized the successorship of the Chicago General Railway Company to the rights granted the West Chicago Street Railway Company by said ordinance of July 27, 1896, cannot now at this late day question the same.

My purpose in directing this communication to you is to make a matter of record in the proceedings of your body

the facts in connection with the construction of the line of railway on Ashland avenue between Blue Island avenue and 31st street, which has been since that time controlled and is now being operated by the Chicago General Railway Company.

Very truly yours,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 6, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have your communication of the 29th ult. requesting this department to furnish a statement of the decisions of the courts in this county in reference to certain petitions for writs of mandamus to compel you to issue dram shop licenses to certain persons.

There are four cases in which this question has arisen in the courts of this county.

The case of *Weiss v. The City*, wherein the petitioner sought a writ of mandamus to compel you to issue a saloon license for a saloon in Grand avenue, opposite St. Columkill's Church. Judge Smith in the Circuit Court granted the petition for mandamus in that case, and an appeal from his decision has been taken to the Appellate Court. In that case the district in which the dram shop was sought to be located was within a short distance of the church, but the street was used almost exclusively for business purposes at or near that point.

The case of *Raben v. City*, was one wherein the petitioner sought a dram shop license for a saloon on East Division street in the immediate vicinity of the Lyman Trumbull School. Judge Hanecy, of the Superior Court, gave a judgment for the petitioner and directed a writ of mandamus to issue. This case the city regards as a very strong one in its favor, and an appeal has been prayed to the Appellate Court. We have every confidence of sustaining our contention in this case.

The case of *Harrison v. The People*, reported in 101

Ill. App., p. 224, while not a saloon license case contains features which are similar to such cases. That case was an application for a writ of mandamus on the part of Fred Jaeger, who sought a license for a bowling alley at 255 Western avenue, said premises being immediately opposite St. Vincent's Church. The license was refused by the executive for that reason. A writ of mandamus was issued by Judge Hanecy, of the Superior Court, of this county; but on appeal the Appellate Court, speaking through Mr. Justice Waterman, say:

"A bowling alley kept for hire is not a nuisance, *per se*, everywhere; yet it may be such, as may be a tannery, in some places.

"Because the court will refuse to enjoin the keeping at a certain place of a bowling alley for profit, it does not follow that it will compel the public authorities to issue a license for one at the same place.

"Courts do not seek to take upon themselves the regulation of the business, manners or pleasures of the community. They decide such cases as properly come before them and are not disposed to relieve executive officers of the duties or discretion by law imposed upon them.

"Courts act and decide in relation to lawful rights. Being of the opinion that the answer of the Mayor showed a valid reason for refusing to issue to the relator the license for which he asks, the judgment of the Circuit Court is reversed and the cause remanded."

The case of *Bily v. City*, was a petition for mandamus to compel you to issue a saloon license for a saloon to be located at the corner of Albany avenue and W. 24th street. The reason for refusing to issue the license was that the proposed saloon was upon a corner immediately opposite a church. There were already two other saloons located upon the two other corners, and the church occupied the remaining corner. Your position in refusing the license was sustained by Judge Clifford of the Circuit Court of this county, who held it a proper exercise of your discretion.

Another case of less recent date was that of *Swift, Mayor, v. People ex rel. Powers*, 63 Ill. App. 454, in which

the court held that courts will not compel, by writ of mandamus, the Mayor of Chicago to issue a license to keep a saloon in a locality where a saloon would be a nuisance, and that the right to keep saloons in any and all quarters of the city in each block and beside homes is not an absolute right.

Yours very truly,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Acting Corporation Counsel.

DECEMBER 7, 1904.

HON. FRANCIS W. PARKER, Suite 1410, Marquette Building,
Chicago.

Dear Sir:

As soon as the printer delivers copies of my opinion in regard to the constitutional amendment, I shall be pleased to mail you one.

I think that you will find that my views in regard to the scope of the amendment are not so restricted as you are led to believe from the published reports.

With regard to your inquiry as to whether or not "there is anything in the amendment which will appear to extend the twenty year sinking fund period fixed by the constitution," I beg leave to say, Section 12 of Article IX provides that any municipal corporation "incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

Since the constitutional amendment under consideration is upon its face, by virtue of the provisions of Article XIV, confined to the amendment of a single article, to-wit, Article IV, it is certain that the direct effect of the amendment is to leave Section 12 of Article IX in full force, except so far as it may be amended by implication, as to the City of Chicago.

If a law authorizing the City of Chicago to issue fifty-year bonds is germane to those provisions of the amendment which authorize the passage of laws providing a "scheme or charter of local municipal government" for the City of Chicago, or laws "requisite to effectually provide a complete system of local municipal government in and for the City of Chicago," then a statute authorizing the issuance of a fifty-year bond might be supported by the amendment. If not germane thereto, I would seriously doubt its constitutionality. Is the passage of a law authorizing the City of Chicago to issue fifty-year instead of twenty-year bonds a law in relation to local municipal government? Is it "requisite to effectually provide a complete system of local municipal government for Chicago?" I am not able to solve my doubts in regard to the questions just stated and should be very glad indeed to have your own views on the subject.

In your letter you say: "I should like also to know by what means the city justifies itself in habitually depleting and failing to provide for the sinking fund required by the constitution." I presume that this sentence of your letter was dictated before our last talk on this subject, but for fear that I did not make myself clear I will proceed to answer it again. If such a thing were being done, no one would justify the habitual depletion of the sinking fund or the failing to provide for it; but it is not done. Rumor has it that many years ago money was borrowed from the sinking fund. I do not know whether this is true or not, but be that as it may, it is not done now nor has not been done during the last ten years. As to failing to provide for the sinking fund, I beg leave to inform you that while there were omissions of duty in this respect in the past, the rule is now firmly established in such a way as to prevent any such oversight or neglect of duty in the future. In the last two annual appropriation bills you will observe sinking fund appropriations for every outstanding bond. I wrote an opinion to the Finance Committee, at its request, informing them that the constitution imposed upon them by mandatory provisions the duty of making such appropriations, and it is notable that even in the face of great financial distress, when

every dollar that could be levied was needed five times over for other purposes, the Finance Committee has none the less made its sinking fund appropriations, although it knew the result would be to make it impossible to appropriate for other matters of immediate and pressing necessity.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 8, 1904.

MILTON J. FOREMAN, Esq., 100 Washington street, Chicago.

Dear Sir:

Your letter of recent date concerning various payments made to the city by the "Fair" for building permits, duly received.

Replying thereto, I beg leave to say that this department rendered an opinion to the Commissioner of Buildings upon the same question on September 6, 1904, a copy of which opinion, for your information, is attached hereto.

I am still of the opinion that when a building is completed, even though it has not been made as large as was originally intended, and as was specified in the permit, that the permit thereupon becomes *functus officio*. The building inspector detailed to inspect such building reports to the department that the building has been completed and that the provisions of the permit and of the ordinances have been fully complied with, if such is the case. The Commissioner of Buildings thereupon closes his record of that particular building and that particular permit. If, under such permit then, the builder could claim a right to put additional stories on such building, or to build any addition to the same, it might happen that the building department would have no notice and no knowledge of such building operations, and structures might be erected without inspection on the part of the building department, and which might be in violation of the building ordinances.

After stating the facts in regard to the issuance of the various permits, and the failure of the "Fair" to construct as large buildings as those authorized by the permits, the

license fees having been computed upon the size of the buildings authorized, and not upon the size of the buildings actually constructed, you write as follows:

“Manifestly either so much of the original permit as was unused should be rebated, or the second and third charges were unjustified. There is no limitation in the first permit as to time of completion of work, nor is anything there provided about the work of building being continuously prosecuted.

“What is the view of the Department of Law on the matter, taking into account the equities?”

I do not believe that in an action at law brought to recover the difference between the fees charged and the amount which would have been charged if computed upon the size of the building actually constructed, any recovery could be had, for the reason that such payments were voluntarily made under no mistake of fact, without fraud or duress. (Am. & Eng. Ency. of Law, page 215 et seq., note 18.)

I am of the opinion that no ministerial officer should assume the responsibility of paying out moneys of the city where there is not a clear legal obligation so to do. The facts which you state, however, constitute equities in favor of the “Fair” which would entirely justify the City Council in passing an order for the abatement and refunding of the portion of said fee which represents the charge for that portion of the building in question not constructed; and I am of the opinion, therefore, that since this phase of the case involves legislative action and is beyond the authority of any mere ministerial officer, the claim for such rebate should be addressed to the council and referred to the Committee on Finance for such action as it may deem proper in the premises.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 8, 1904.

E. M. LAHIFF, ESQ., City Collector.

Dear Sir:

I have a communication from you of the 5th inst., where-

in you ask the opinion of this department as to whether a license officer is required to allow any one to examine petitions for dram shop licenses other than those whose names appear thereon while he has such petition in his hands for verification.

The petition for a dram shop license is a condition precedent to the granting of the license and for the purpose of verifying the signatures thereon it is given to a member of the police force who is known as the license officer. This officer takes the petition and personally ascertains whether the persons purporting to have signed said petition have in reality signed it. The petition is in his hands for a special purpose, and during the time he is thus entrusted with it, I am of the opinion that he not only is not under any obligations to show the petition to outsiders, or persons other than those whose names appear thereon, but that it would be improper for him to do so. His work is of a more or less secret and confidential nature and is restricted to seeing and interviewing the petitioners. Nothing in his duties as connected with verifying the petition would necessitate his allowing any one outside of those whose names appear upon the petition to see the petition.

Yours very truly,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

DECEMBER 8, 1904.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

I have your letter of the 1st inst. transmitting a communication from Bryan Lathrop of November 29, 1904, which is as follows:

"I wish to construct a coal vault in the private alley at the rear of No. 74 State street. Said vault is to be built in accordance with the plan submitted herewith. I desire a permit from your department, or such instructions as will

prevent the police from interfering with the work when once commenced.

“You will please note that the alley in question is not a public but a private alley.”

The question here presented is whether the alley in the rear of 74 State street, referred to in Mr. Lathrop's letter, is a private or a public alley.

I have caused the City Map Department to prepare a plat showing the location of said alley, which plat I attach hereto. The alley in question is shown on the plat running north to Randolph street from the alley running east and west through the block between Dearborn street and State street.

In passing upon this question I have examined abstracts of title of the property in question. The first mention of the alley in question was contained in an agreement executed October 12, 1842, and recorded October 14, 1842, in book 8, pages 266 and 267, as document No. 10380. Attached to said agreement was a plat showing the alley in question. The following, purporting to be the substance of said agreement, is taken from the letter press copies in the office of the Chicago Title & Trust Company:

“We, who have hereunto set our hands and seals and every of us, do hereby covenant and agree with each other and with Alvin Cahoun (Calhoun) that we, Joseph Matteson, Elihue Kendall and Walter S. Gurnee, our personal representatives and assigns, shall and will forever keep open an alley ten feet as marked upon the above plat as a private alley to be used by the said Matteson, Kendall, Gurnee and Calhoun, their personal representatives or assigns; said alley to run parallel to the line of State street 90 feet west of the easterly line of Lot 1 in Block 37 in the Original Town of Chicago, to be ten feet wide and 180 feet in length, running from Randolph street to the first alley south of the same, which runs parallel thereto; said alley to be used by the above mentioned persons and their assigns as a passage way, to be always unobstructed and kept free and clear of every kind of nuisance whatsoever and to be provided with a gate at each end if desired by any of the parties hereto, and the

said Joseph Matteson, Elihue Kendall and Walter S. Gurnee for the strict observance of each, all and every of the above mentioned conditions hereby covenant and agree with each other and with Alvin Calhoun and the personal representatives and assigns of each other and the personal representatives and assigns of the said Alvin Calhoun, hereby also binding the personal representatives and assigns of each and every of them for the consideration of one dollar paid to each and every of the parties hereto by the other, the receipt whereof is hereby acknowledged before the ensealing and delivery of these presents.

“(Signed) :

“Joseph Matteson (Seal),

“Elihue Kendall (Seal),

“Walter S. Gurnee (Seal),

“Alvin Calhoun (Seal).”

Said agreement and said private alley are referred to in various documents noted in the abstracts of title to property abutting on said alley. The last document presented to me for examination and referring to said alley is a warranty deed by Carrie C. Springer and George A. Springer, her husband, to Francis Bartlett, of Boston, Mass., dated January 11, 1886, and recorded January 13, 1886, in book 1762 of records, page 121, as document No. 683797, in the recorder's office of Cook County, Ill.

The alley in question was also referred to by the Supreme Court of Illinois in the case of *City of Chicago vs. Borden*, 190 Ill., at page 430 et seq. The controversy there, was whether the continuation of the alley in question south from the said east and west alley in said block to Washington street was or was not a private alley. The court sustained the decree of the Circuit Court of Cook County holding that said alley was a private alley. The controversy in that case arose from a similar state of facts now existing—the complainant Borden seeking to excavate areas or cellars under said alley, the city officers interfering or threatening to interfere with his so doing without authority from the municipality, and the filing of a bill to enjoin the city officers on the ground that said alley was a private alley.

One of the circumstances relied upon by the city in the Borden case was the fact that in 1884 the City of Chicago levied a special assessment on the property abutting upon the alley running from Washington street to Randolph street, between State and Dearborn streets, for the purpose of curbing, grading and paving the same. The court in discussing this point, at pages 450-451, said:

"It appears from the record that, in that proceeding, certain owners of property, abutting upon the portion of the alley north of the east and west alley, and between the latter alley and Randolph street, filed objections to the confirmation of the assessment. Among these objections was the objection, that the property, on which the proposed improvement was to be made, was private property, and not public property under the control and management of the city, and that said alley was a private alley, and had never been dedicated or platted as a public alley. By a stipulation entered into between the parties, making this objection, and the city, the city agreed that such objection should be sustained as to the property of the objectors. The city consented, that a judgment should be entered sustaining the objection, so filed, as to the property, for which such objection was made. Thereby, the city consented to the contention that a part of the alley sought to be paved was a private alley."

From all the circumstances shown of record in this case, the opinion of the Supreme Court in the Borden case, *supra*, holding that the south half of the alley running from Washington street to Randolph street, between Dearborn and State streets, is a private alley, and the judgment referred to by the Supreme Court and quoted above as the judgment in said special assessment proceedings, I am of the opinion that the said alley is a private alley for the uses and purposes mentioned in said agreement of October 12, 1842, and that the public never acquired any right to said alley.

The decision of the Supreme Court in the Borden case is, in my opinion, practically controlling in this case. If that controversy had never arisen and the opinion of the Supreme Court had never been rendered, the city would undoubtedly now resist the effort of the owners of property abutting upon

the alley now under consideration and would endeavor to sustain the proposition that this alley is a public alley. In the light of the Borden opinion, however, I am constrained to hold said alley to be a private alley, and that the city has no power to require the owners of property abutting on said alley to obtain a permit for the building of any structure in said alley other than the usual building permit.

Very truly yours,

WM. H. SEXTON,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 8, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter enclosing report, and accompanying plat, from the Superintendent of Maps, regarding slip "A", together with a letter from the John Spry Lumber Company asking that this slip be dredged without any further delay.

You ask whether this slip is a part of the Chicago River, and a public water way, and if when discontinued and filled up, it would become a public street.

While the matter is not entirely free from doubt, we are inclined to think, from a reading of the opinion of the Supreme Court in the case of *Beidler v. Sanitary District of Chicago*, 211 Ill. 628, where rights in a similar slip were in controversy, that by long continued user of this slip, it having been dedicated in October, 1871, it has been made public property and a public highway. Mr. George E. Spry called yesterday in reference to the matter and made a very strong complaint against the existence of the sewer which empties into slip "A", saying that it made this slip an intolerable nuisance, depreciating the value of the property, and makes it almost impossible for people to remain near that neighborhood. If his statement is correct, then it is incumbent upon the city to do something that will suppress this nuisance.

While it is the right of the city to empty its sewers into rivers and their tributaries, it does not give them the privilege of maintaining a nuisance. (*Jacksonville v. Doan*, 145 Ill. 23.)

Herewith we return the plat and the letters accompanying it.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

DECEMBER 10, 1904.

MILTON J. FOREMAN, ESQ., Chairman Committee on Local Transportation, of the City Council.

Dear Sir:

At the request of your committee I have examined an ordinance introduced into the City Council on November 21, 1904 (Council proceedings, page 1536), and referred to your committee, by which it is proposed to grant to the South Chicago City Railway Company three things:

First. To operate cars for the use of the United States Postoffice Department;

Second. To operate cars for the carriage of parcels and packages;

Third. To connect its tracks with the tracks of any other street railroad or sidetracks of any steam railroad in said City of Chicago.

The ordinance contains no provisions for the payment of any compensation for the privileges therein proposed to be conferred. Whatever may be said about the granting of privilege to operate cars for the use of the Postoffice Department, surely nothing can justify the gratuitous gift of a privilege to an existing street railway company to carry parcels and packages.

The privilege to connect the tracks of said company with "any other street railroad", or with the "sidetracks of any steam railroad", is legislation of the most vicious sort. If passed and held to be valid, it would convert the rights of

said company, which are now limited to specific streets, into blanket privileges to run anywhere in the City of Chicago. No such ordinance should be considered on any terms whatever or for any compensation, unless the specific routes where connections are to be made with other lines are accurately described and limited. To grant such a roving commission to any street railway company would also be contrary to the provisions of law which require frontage consents to be obtained before any ordinance is passed authorizing the laying down of street railway tracks.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 12, 1904.

MILTON J. FOREMAN, ESQ., Chairman Committee on Local Transportation, of the City Council.

Dear Sir:

On December 1st, in answer to the request of your committee, I transmitted an opinion stating that an arrangement for the requirement of transfers on Ashland avenue might be taken up for consideration and action by your committee without prejudice to the city's rights in the pending controversy of the "Ninety-nine Year Act", so-called.

Your committee now requests an opinion as to what steps can be taken to secure transfers on said Ashland avenue line.

As already stated in the opinion above referred to, the Chicago General Railway Company is operating a line of street cars on Ashland avenue between 22d and 31st streets. The ordinance for this part of the line was passed July 27, 1896, for a term of twenty years and describes the line as Ashland avenue between the northeasterly line of Blue Island avenue and the south line of 31st street. It runs to the West Chicago Street Railroad Company and appears in Volume II of Special Ordinances, at page 1661. This line was constructed by the Chicago General Railway Company under an agreement amounting to an assignment of rights of said West Chicago Street Railroad Company. Section 7 thereof provides:

“The rate of fare for a continuous ride shall be five cents for each passenger on the said several lines of railway hereby authorized; it being understood, however, that the lines on . . . Ashland avenue are extensions of lines on those streets, and it is intended to make the rate of fare five cents for a continuous ride from one end of the line to the other.”

Since the Chicago General Railway Company is operating said portion of said line under an assignment of rights of said West Chicago Street Railroad Company, said Chicago General Railway Company stands in the shoes of said West Chicago Street Railroad Company and has no greater or different rights than its grantor. The Union Traction Company is operating a line of street railway on Ashland avenue north of 22d street to 12th street, under an unexpired grant contained in an ordinance passed March 21, 1892 (Vol. II, p. 1636). There can be no question as to the right of the city to compel the exchange of transfers between said Chicago General Railway Company and the Union Traction Company, successor to the rights of said West Chicago Street Railroad Company, on that portion of Ashland avenue directly north of 22d street. The decision of our Supreme Court in the transfer cases, 199 Ill. 484, is conclusive upon this question.

That portion of Ashland avenue south of 31st street is occupied by tracks of the Chicago City Railway Company, constructed and operated under the authority of an ordinance dated May 26, 1884, appearing in Volume II of Special Ordinances, at page 1093, expired on July 30, 1883, was renewed for twenty years to July 30, 1903, and has been again renewed to December 31, 1904.

There are no specific provisions in any of the ordinances above referred to with regard to the issuance of transfers on Ashland avenue between the lines of the Chicago City Railway Company and the Chicago General Railway Company, nor do the general ordinances in regard to transfers apply to this case, the lines in question being neither owned nor operated by said company nor by companies who claim title from a common source or which are so connected in their re-

lations, as to be regarded as identical in ownership, interest or management.

In order, therefore, to compel the exchange of transfers between the Chicago City Railway Company and the General Electric Railway Company on Ashland avenue at 31st street, it will be necessary for the city to act, under its police power, by the passage of a general ordinance applying to all street railway companies similarly situated. It was under this power that the city passed the amendment to Section 1723 of the code on June 26, 1890, requiring transfers:

“At any point where any line of any street railway owned, leased or operated by any person, firm or corporation, does now, or shall hereafter, within the limits of the City of Chicago, join, connect with cars, intersect or come within a distance of two hundred feet of any other line of street railway owned, leased or operated by the same person, firm, company or corporation.”

Which ordinance was sustained by the Supreme Court in the transfer case referred to above. While the ordinance there under consideration was limited to transfers on lines owned, leased or operated by the same company, yet in my opinion the principles laid down by Mr. Justice Magruder in that case, carried out to their logical extent, might well support the passage of an ordinance compelling transfers between the three companies operating on Ashland avenue. The learned justice who wrote that opinion holds that the city has the right to regulate fares of street railways under the provisions of the charter of 1851 of the City of Chicago and the amendments thereto; that such regulation of rates is not an infringement of the contract-rights of the companies organized under the acts of 1859, 1861 and 1863. He calls attention to the fact that the original west side ordinances were granted to the Chicago City Railway Company; that it was obligated to carry passengers on its lines in the south and west divisions of the City of Chicago for a single fare not exceeding five cents; that the Chicago West Division Railway Company acquired its rights from the Chicago City Railway Company, and that therefore it was also obligated to carry passengers in the west and south divisions of the City

of Chicago for a single fare not exceeding five cents. Every point, save one, which might be urged by the Chicago City Railway Company against a general ordinance compelling it to exchange transfers with the Chicago General Railway Company, or with the Chicago Union Traction Company, while not adjudicated in that case because not directly involved, has none the less been impliedly decided in favor of the city by the analogy of the reasoning there employed. The language of the court applied, as it is, so significantly to the regulation of rates, involving, as it does, the right of the city to reduce fares, is extremely significant. I think that the only question which would be left open by that decision would be the question as to the reasonableness of the ordinance through which the city might undertake to exercise its police power in the regulation of rates and the compulsion of transfers.

I submit you herewith form of council order in relation to transfers between the Chicago General Railway Company and the Chicago Union Traction Company.

I have not prepared an ordinance to compel transfers between the Chicago City Railway Company and the Chicago General Railway Company because your committee has not yet taken action in regard thereto.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 14, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter regarding the council order of July 7, 1902, Council proceedings, page 930, relative to the rates to be charged for water furnished lodging houses where baths are given to lodgers free, in which you ask:

“Should a charge for extra persons and extra rooms be charged for such lodging houses where assessed under this order for frontage rates?”

Inasmuch as it is not competent for the city to repeal, amend or change any ordinance by resolution or council order

(*Galt v. Chicago*, 174 Ill. 605, 607), the council order to which you refer has no bearing upon the matter, and it is one to be determined by the water rate ordinance of 1902. Under that ordinance the lodging houses should be classified either as boarding houses or hotels, and rates for such institutions are in addition to frontage rates.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

DECEMBER 14, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In compliance with your request for an opinion in regard to the law upon the subject of boxing or sparring exhibitions or matches, whether held at clubs or elsewhere, I beg leave to say:

Section 232, Chapter 38, R. S., Ill., reads as follows:

“Whoever, by previous appointment or arrangement, meets another person and engages in a prize fight, shall be imprisoned in the penitentiary not less than one year nor more than ten years.”

Other sections of the law provide heavy penalties for the trainers, witnesses and “all who advise, encourage and promote such fight.”

The Century Dictionary defines the term “prize fight” as “a pugilistic encounter or boxing match for prize or wager.”

The Supreme Court of Mississippi says:

“A prize fight is a pugilistic encounter or boxing match, in public, for a prize, wager or reward.”

State of Mississippi v. John L. Sullivan, 67 Miss. 346.

In England it has been defined as follows:

“An engagement between two persons contesting with their fists for physical supremacy, intending in some degree to do bodily harm to each other, and expecting as a result of

the contest to receive some honor, reward or emolument. It makes no difference whether the contest is with or without gloves nor what kind of gloves are used."

Reg. v. Orton, 39 Law Times, 293.

It has been declared by the Ohio courts that it makes no difference whether the contest is given in public or private. *Seville v. State*, 49 Ohio St. 117 (15 L. R. A. 516.)

The courts of Michigan have declared that it makes no difference whether the bodily harm inflicted or intended to be inflicted is slight or serious nor whether the contest is for points or to a finish. It is nevertheless a prize fight-if the principals to it meet by agreement and enter a ring and for money or other valuable consideration strike each other with the intent to injure in order to win a victory. *People v. Taylor*, 96 Mich., p. 576 (21 L. R. A. 287).

In a somewhat celebrated opinion filed in the Court of Common Pleas of Hamilton County, Ohio, Mr. Justice Hollister said (reviewing the above and other cases):

"From these decisions it will be seen that the courts take a common sense view of the two words 'prize' and 'fight,' and declare in substance that there must be a prize offered for the fight and the fight given for the prize. The fight need not be brutal or fatal; it may even be friendly and the amount of injury done may be slight. . . . So the prize given need not be in any particular form; it may be an honor, or a fixed sum, or a proportion of the receipts taken at the door."

State ex rel. v. Hobart, 11 Ohio Decisions, 166.

It should therefore be emphasized at the outset that any sort of a sparring contest where the participants are paid or receive any money or other valuable reward, no matter what it may be called, nor how it is conducted, nor where it is held, is a prize fight, and, under the statute of Illinois above referred to, is, for the participants a felony, and for even the witnesses a misdemeanor, punishable with heavy penalties.

Judge Hollister in the Ohio case above referred to said:

"It is immaterial whether the athletic club was organized as a bona fide and as a permanent institution or not, but even had it been in existence for years, with proper appliances and equipment for athletics of various sorts, such

an institution could not exhibit such a contest as this under any circumstances."

Having discussed the statute with regard to prize fights, and having demonstrated that there is no conflict whatever in the reported cases upon the proposition that this term should properly be applied wherever the participants receive money or any reward in connection with the contest, I now pass to consider the law of Illinois with regard to boxing or sparring exhibitions proper.

Section 235 of Chapter 38 of the Revised Statutes of Illinois reads as follows:

"Whoever undertakes, carries on, promotes or engages in sparring or boxing exhibitions shall be fined not exceeding five hundred dollars or confined in the county jail not exceeding six months."

Since Section 232 first above quoted includes every such contest where the participants receive a compensation or reward, this section must be held to apply to those encounters only where there is no prize, compensation or reward, but where the participants are actuated wholly by the love of the sport and where its only rewards are, the splendid elation which comes from the consciousness of the possession of physical power, exercised with skill and address, beyond that of the average individual, the love of the conflict itself and the exaltation of victory. Sparring exhibitions of this sort, properly conducted and limited, are not unlawful in England (*Reg. v. Young*, 10 Cox C. C. 371, and *Reg. v. Orton*, 14 Cox C. C. 226); nor in Ohio (*State ex rel. v. Hobart*, 11 Ohio Dec. 166-198). In the latter State, however, this conclusion is based upon the fact that the statute itself exempts sparring or boxing exhibitions given in a "public gymnasium or athletic club." In other States, however, public boxing matches are declared to be unlawful. (*Com. v. Collberg*, 19 Mass. 350; 1 Steph. N. P. 211; 2 Whar. Cr. Law, Sec. 1012.)

As this is a question which is here governed wholly by the statute of Illinois, it is not necessary to discuss at any length the decisions of the courts of other States.

It should perhaps be noted that Section 235 above quoted does not establish a penalty for sparring or boxing, but for

“any sparring or boxing exhibition.” The exhibition is the material element of Section 235, *supra*. On this point Judge Hollister, in the leading Ohio decision (*State ex rel. v. Hobart, supra*), says:

“Quite different is a boxing match in a gymnasium or athletic club, institutions organized by men of serious purpose, who appreciate the need of physical culture and exercise, so that they may be the better fitted to pursue the ordinary vocations of life, occupations honorable and useful, of profit to themselves, and which organized society requires should be carried on for its needs. Boxing is a favorite form of amusement and is healthful exercise for men of use in the world and with whose pursuits it has no connection, but is merely incidental with other forms of exercise to the proper maintenance of the physical nature.”

I think that the learned judge in the language above quoted well distinguishes between two entirely separate classes of boxing bouts, but it should be borne in mind that in Illinois even this latter class of encounters must not become “exhibitions.” The Century Dictionary defines this term as follows:

“3. That which is exhibited; a show; especially a public show or display . . . as, a school exhibition, an athletic or dramatic exhibition.”

These “exhibitions” must not be conducted at a place where the public are invited to attend and witness the performance, either upon the payment of an admission fee or gratuitously. A contest of this sort in a private house where only those are present who belong there, or in a bona fide athletic club or gymnasium where only those spectators are admitted who similarly belong there, is not, in my opinion, within the intent of said statute. Friendly bouts of this nature, witnessed only by those who happen to be present and have a right on all occasions to be there, such as bona fide members of the club, are lawful; but the moment that the contest is for any prize or reward, it becomes a felony, punishable by imprisonment in the penitentiary, and the moment that spectators are invited, the public are admitted and the

contest becomes an exhibition, it becomes a misdemeanor, punishable by fine and imprisonment in the county jail.

It is perhaps worthy of serious consideration by some of those clubs which have of late been permitting "prize fighting" within their doors, that the Supreme Court of Indiana has decided (*Columbian Athletic Club v. State*, 143 Ind. 98) that in such cases, the corporate charter of the club might be forfeited in *quo warranto* proceedings upon due proof of the abuse of its franchises by the participation in felonious practices.

Very respectfully,
EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 14, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Under date of December 9, 1904, you addressed a letter to this department in which you state that "it is necessary that repairs be made to the West 18th street viaduct at once in order to have same completed when the new bridge is ready to be put in operation." You add that "on page 506 of the Council Proceedings of April 15, 1878, . . . appears an ordinance which appears to place the obligation to repair on the City of Chicago;" and you wish to be informed whether or not there is a later ordinance which places the responsibility for repairs on the railroad companies.

In reply, I beg to say that I have been unable to discover any subsequent ordinance modifying the ordinance of April 15, 1878, or changing the obligations of the railway company in respect to W. 18th street viaduct.

The ordinance referred to provides, in substance, that the Pennsylvania Company shall contribute the sum of \$14,000 towards the expense of building a viaduct at 18th street across its tracks, and that "said city shall maintain approaches to, and floor of said viaduct at its own expense, and also do all ordinary repairs."

The railway company having performed the obligations imposed by said ordinance by the payment of the sum of \$14,-

000, the terms of the ordinance have now all the force and effect of a contract between the city and the railway company. *Your letter does not state the nature of the repairs which you say are necessary to the viaduct, and I am, therefore, unable to state whether such repairs should be made by the railway company or by the city.*

I note that Mr. Loesch, attorney for the Pennsylvania Company, in a letter to you dated December 9, 1904, construed the above mentioned provision of the ordinance referred to, as follows: "It is the duty of the city to maintain the floor and approaches and make the ordinary repairs as therein provided, but if extraordinary repairs or rebuilding should be necessary, then, except the floor and the approaches, the viaduct must be built by the railway company, but the railway company cannot be required to make the viaduct wider than the existing one."

I agree with Mr. Loesch so far as holding that under this ordinance the city is required, at its own expense, to do all ordinary repairs, and that if extraordinary repairs or rebuilding should be necessary it must be done by the railway company, but I do not agree with him in his contention that the "railway company cannot be required to make the viaduct wider than the existing one," on the contrary, I believe that if the increased volume of traffic over the viaduct makes necessary a wider viaduct than the existing one, the company should be held liable to build it.

I attach hereto a copy of the ordinance of April 15, 1878, and return all correspondence accompanying your letter.

Yours very truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

DECEMBER 16, 1904.

WILLIAM J. PRINGLE, ESQ., Room 624, 184 La Salle Street,
Chicago.

Dear Sir:

The Mayor has asked this department to take up with you

the question of the necessity of Hynes Bros. and the Builders' Supply Company complying with Sections 1214 and 1215 of the Revised Code of 1897, requiring a license for conducting a lumber yard, and has forwarded the letters written to him by the above mentioned firms on the subject.

From the correspondence, it appears that the Builders' Supply Company manufactures sash doors and blinds, and maintains a licensed lumber yard at number 909 W. Madison street; that at number 3551 State street it carries a stock of not to exceed 15,000 feet of milled lumber, together with some sash doors and blinds. It also appears that Hynes Bros. are contractors and builders and carry their stock of dressed lumber, sash doors and mouldings in a shed erected on a 25-foot lot.

The question is whether or not the above sections of the ordinance include dealers of this kind. The sections read as follows:

"1214. LICENSE. No person, firm or corporation shall engage in the business of keeping or maintaining a lumber yard or other place where lumber is sold from yard, place, car or vessel, without first having obtained a license therefor as hereinafter provided."

"1215. APPLICATION—CONTENTS—FEE. Any person, firm or corporation so desiring to carry on such business as aforesaid, shall file with the City Collector an application in writing therefor, and upon payment to the City Collector of an annual license fee of one hundred dollars, any such applicant shall be entitled to a license to carry on business as aforesaid."

I am of the opinion that neither of the above concerns is engaged "in the business of keeping and maintaining a lumber yard", and are therefore not within the provisions of the ordinance.

Yours very truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

DECEMBER 16, 1904.

J. F. McCARTY, Esq., Acting City Collector.

Dear Sir:

I acknowledge receipt of your letter of the 5th inst., with stated enclosure, asking for an opinion as to whether or not beer peddlers mentioned by License Officer Seery are required to have a wholesale malt liquor dealer's license. The officer states that there are a number of persons in his precinct who do a large business selling bottled beer by the case to private families or to anyone who will purchase it; that they buy the beer from breweries, store it in barns or basements and peddle it from their wagons.

Section 1194 of the Revised Code of 1897, provides that:

"No person, firm or corporation, within the City of Chicago, shall sell or offer for sale, any malt liquor in quantities of one gallon or more at a time, without having first obtained . . . a license so to do for each place of business where such malt liquors shall be so sold or offered for sale, or for all wagons run for the purpose of such selling or offering for sale without any fixed place of business therefor, . . . wagons run by a vendor without a fixed place of business shall be covered by a license specifically therefor."

I am of the opinion that the vendors referred to by Officer Seery come within the provisions of the above section, and are required to have a license.

Yours very truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

DECEMBER 19, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Under date of December 14, 1904, the City Collector has referred to this office the petition of George Willy for a license to keep a saloon at No. 10550 Ewing avenue, and has requested that the same, with our opinion, be forwarded to you.

The City Collector states that "there seems to be some

dispute in reference to the signature for the Heinsen property," and asks that we give him our "opinion in reference to this matter."

From the papers attached to said petition, it seems that the Heinsen property has a frontage of 171 feet, and the question is whether or not the person signing for this frontage has legal authority so to do.

It appears from the report of License Officer Allman, and also from a letter from the Calumet National Bank, both of which are attached to said petition, that the record title to said property is in the Calumet National Bank. Said bank, however, expressly disclaims the ownership to said property and states that it is owned by Mrs. Heinsen. A letter from M. R. Harris, who subscribes himself an attorney for the estate of Hans Heinsen, deceased, states that Mrs. Inger C. Heinsen, widow of Hans Heinsen, has a life estate in said real estate. Attached to the petition is a document dated May 1, 1904, quite informal in language, but I think sufficient, by which Mrs. Heinsen, who signs as "Mrs. H. Heinsen, Executrix," authorizes *Squire S. Burke* to sign saloon petitions for the "H. Heinsen estate." I am advised that Mrs. Heinsen and Inger C. Heinsen are one and the same person.

It will thus be seen that the 171 feet of frontage hereinbefore referred to has been signed for by one who has only a life interest therein. The ordinance of the Village of Hyde Park, under which the application for a saloon license is made, reads as follows:

"Any person who shall desire to obtain a license to keep a saloon or dramshop, shall, in addition to the requirements now provided by ordinance, present his application in writing to the Village Comptroller for such license, in which shall be stated the name of the person or firm to whom the license is to be issued and the place where such saloon or dramshop is to be kept, which application shall be signed by a majority of the property owners according to frontage on both side of the street in the block upon which such dramshop is to be kept. . . ."

Section 2085, Revised Code of Chicago, 1897.

The question, then, resolves itself, whether or not Mrs.

Heinsen is a "property owner" within the meaning of the above quoted ordinance. The Supreme Court of this State in construing the word "owner" as used in connection with real estate, says: "The word 'owner' has been repeatedly determined to mean a fee simple interest in the land."

Jarrot v. Vaughn, 2 Gilm. 138;

I. M. F. Insurance Co. v. Manf. Co., 1 Gilm. 236;

Wright v. Bennett, 3 Seam., 459;

Whiteside v. Divers, 4 Seam. 336;

Merritt v. Kewanee, 171 Ill., 551.

The foregoing definition has been uniformly adhered to by the Supreme Court. It is a well known rule of construction, that when words have acquired a meaning through judicial interpretation it is to be presumed that such words were used in that sense in subsequent statutes.

The Abbotsford, 98 U. S. 440.

It must, therefore, be presumed that the framers of the ordinance above quoted in using the expression "property owners" intended the word "owners" to have that meaning which the Supreme Court had repeatedly given it, namely, owners of a fee simple interest. It follows, therefore, that the owner of a life estate is not such an owner as is contemplated by the ordinance and has not the right to sign a petition for a saloon license.

It appears from the report of License Officer Allman that the total frontage of the block in question is 3,365 feet; number of feet required to constitute a majority, 1,683; number of feet represented on applicant's petition, including the 171 feet above mentioned, 1,793.5; number of feet represented on petition not including the 171 feet above mentioned, 1,622.5; consequently, the petition is short 60.5 feet of the amount required to entitle applicant to the license.

Petition and all correspondence and documents transmitted herewith.

Respectfully submitted,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

DECEMBER 21, 1904.

MR. GEORGE WILLIAMS, Building Commissioner.

Dear Sir:

Answering your verbal inquiry as to whether your department, or the Mayor, or any other department of the city, has authority to refuse a permit for the construction of a private barn on private property by the owner thereof where the construction of such barn is complained of on account of its proximity to a church, I beg leave to say:

Neither the statutes nor the ordinances give any person any authority to refuse such a permit in such a case. The owner of private property has the right to construct a stable thereon for his own use or for use in connection with his business, so long as he complies with the provisions of the building ordinance governing the construction of such stables. No matter how annoying it may be to a church, the erection of the building cannot be prevented in advance by the municipal authorities. This is not a case of the construction of a livery, boarding or sale stable, and the police power vested in the municipality under certain conditions with regard to such structures and business does not apply to private barns. If the stable is so conducted as to be a nuisance within the legal meaning of that word, the private property owners have adequate remedy by injunction, indictment and otherwise to abate the nuisance which arises from the improper conduct of the stable; but there is no warrant of law for presuming in advance that a private stable will be a nuisance.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

DECEMBER 21, 1904.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Your letter of the 20th inst., duly received. In said letter you state "that the new cars in use by the City Railway Company are so wide that there is not space between two passing cars for even a small sized man to stand without be-

ing crushed to death," and you instance two fatalities which have occurred at Madison and Clark streets on this account.

In accordance with your request I have examined the ordinances and find there are no provisions now on the books with regard to the width of street cars. The present condition, arising, as it does, from a change in the operation of the street railway business, could not have been foreseen at the time that the existing ordinances were drafted. I am of the opinion, however, that the city, under its police power, has the unquestioned right now to pass an ordinance which shall regulate either the width of the cars or the distance between parallel tracks, so that a passenger who may be caught between two cars going in opposite directions may have room to stand in safety.

I recommend that you instruct the Commissioner of Public Works to furnish this department with the necessary information on this subject as to the physical facts; that is to say, the width of the cars that are used and a recommendation as to what would be a safe provision for the distance between such new cars. With this data before me I shall be able to submit for your consideration an ordinance on the subject, which, if approved by you, may well be submitted to the next meeting of the City Council with a special message.

Yours very sincerely,

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 22, 1904.

FRANCIS O'NEILL, General Superintendent of Police.

Dear Sir:

Referring to your letter of the 14th inst., regarding what method should be pursued by you in fining police officers under the law, as construed by Judge Tuley in the recent case of Andrew O'Regan vs. City—Circuit Court—Gen. No. 255,092, I respectfully suggest the following:

In the event that the Trial Board or Civil Service Commission should decide that a case referred to them by you for investigation did not warrant discharge, they should simply report that fact to you with a statement of what they con-

sidered was proved at the trial. Then, under Judge Tuley's opinion, and also under the decision of Judge Dupuy *in re Eugene Clifford v. City*, Superior Court—Gen. No. 234,029, I see no legal reason why you could not by a general order as General Superintendent of Police, without reference to the findings of the Civil Service Commission, impose a fine of not to exceed ten days' pay. The officer should be given a hearing by you before he is fined.

Under the above decisions, I believe that the power of disciplining the members of your department, given by Section 1497 of the Revised Code of Chicago, is not changed by the Civil Service Act, except only as to the power of dismissal from the force.

Respectfully submitted,

CECIL PAGE,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

DECEMBER 27, 1904.

MR. E. M. LAHIFF, City Collector.

Dear Sir:

Under date of November 29, 1904, you addressed a letter to this department, stating that the University Club of Chicago has taken out a dram shop license for the period of four months ending August 31, 1904, and filed a bond expiring April 30, 1905. You request an opinion as to whether the bond aforesaid would be valid for the period beginning September 1, 1904, or a new bond would have to be filed.

Replying to your inquiry, I beg to say that from an inspection of the bond, a copy of which was attached to your letter, it appears that it is therein recited that the University Club of Chicago "has obtained a license to keep a dram shop at its club house, number 116 Dearborn street, in said city until April 30th, A. D. 1905;" this is the recital in the "grocery bond." In the "saloon bond" it is recited that "the University Club of Chicago has obtained a license to keep a

dramshop until April 30th, A. D. 1905, at club house, number 116 Dearborn street in said city."

If the surety on this bond were sued for breach thereof occurring at any time between the 31st day of August, 1904, and the 30th day of April, 1905, it would not be permitted to set up the defense that the license had not been issued for the whole year but only for a portion of the year for the reason that the bond itself expressly recites that the license was issued for the whole year, and "it is an established rule that sureties are estopped to deny the facts recited in their obligations whether true or false."

Brockway v. Petted, 79 Mich. 620, 627.

Brandt Suretyship, Sections 29 and 30.

In the case of *Rudd v. Hanna*, 20 Ky. 528, it was held that where a bond had been given in which it was admitted that a certain person was then in custody, the obligor, when sued, was estopped to plead that the prisoner had escaped from custody previous to the execution of said bond.

The same principle has been upheld in other cases:

Placer Company v. Dickinson, 45 Cal. 12;

State v. Bird, 2 Rich, Law 99;

Allison v. State, 8 Heisk. 312;

Dedham Bank v. Chickering, 3 Pick. 335.

For the reason above indicated, I am of the opinion that the surety would be liable on the bond in question during the continuance of the entire license year in this case. The practice of taking bonds for a year and issuing licenses for a part of a year is not, however, commended, and it is suggested that the better practice would be to take a bond only for the period covered by the license and require a new bond to be filed whenever a new license is issued.

Yours very truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

DECEMBER 27, 1904.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Answering your inquiry as to the validity of contracts for public work containing specifications that in the doing of the work therein provided for, eight hours shall constitute a day's labor, I beg leave to say:

On September 20, 1901, I addressed an opinion to the Board of Local Improvements reporting that the clauses in question had been declared illegal by our Supreme Court and advising that they should be eliminated from the form of specifications used by the board in the letting of contracts for improvements to be made by special assessment. Since the date of the said opinion, the Supreme Court of Illinois has handed down a large number of decisions declaring such contracts to be illegal in special assessment cases.

On October 19, 1903, I approved an opinion addressed to you, written by Assistant Corporation Counsel John W. Beckwith, in which said special assessment cases and the decisions of other courts are reviewed, and in which the conclusion is stated as follows:

"I am therefore of the opinion that this specification attached to and made a part of a contract for public work, awarded by competitive bidding, is illegal and void, and that the city cannot force contractors to adopt an eight-hour day under such contracts."

In every opinion which I have written on this subject I have carefully confined my conclusion to contracts awarded by competitive bidding, and have repeatedly said that where the city does the work itself by day labor it may establish an eight hour day.

Since this opinion has been written the Supreme Court of the United States, in the case of *Atkin v. Kansas*, 191 U. S. 207, has declared a statute of that State which requires the contractor in doing public work to establish an eight hour day, and providing penalties for the employment of laborers for more than eight hours in one day, to be a valid exercise of State legislative power. This decision, however, does not affect the law in Illinois for two reasons:

First. The decisions of that court in matters of local or State law are not binding upon State tribunals, and being in conflict with the decisions of our own Supreme Court cannot be considered as establishing a rule of law until our Supreme Court shall have expressly adopted the Federal rule and overruled or distinguished its former decisions. (*In re Thomas A. Morgan*, 47 L. R. A. 52.)

Second. The decision in the Kansas case was based upon a State statute which not only established an eight hour day for all public work, but provided penalties for the employment of labor on public works more than eight hours in one day. We have no such statute in Illinois. The provisions of Ch. 48 of the Revised Statutes of this State simply amount in law to the definition of the term "day" where no contract has been made to the contrary, and do not declare it to be an offense against the law to contract for a longer day or to employ for more than eight hours in a single day.

The facts, therefore, upon which the decision in the Kansas case rests do not exist in this State, and the decision of the Federal Supreme Court is not applicable to the law in Illinois. If the legislature of Illinois should pass a statute similar to that of Kansas, our Supreme Court would doubtless consider the opinion of the Federal Supreme Court as possessing "a high degree of persuasiveness", but what their final conclusion would be is, of course, beyond the wisdom of the profession to predict. Suffice it to say for the present that no such statute exists in our State to-day.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

DECEMBER 29, 1904.

MR. WILLIAM B. WICKERSHAM, Sec'y. Chicago Public Library.

Dear Sir:

We are in receipt of your letter regarding the money that the Chicago Public Library will receive under the will of Hiram Kelly, in which you ask whether or not the specification in the will relative to the use of the principal might be waived and a part of the principal used in building a

branch library on the west side, to be known as the Kelly Branch.

It appears from the copy of the will which you sent with your letter that the legacy of \$20,000 given to the library is limited, so that the library can only use the income.

As residuary legatee, the library will receive the whole of the surplus of the trust fund, "the income thereof to be used by them (the Board of Directors) in such manner as they may deem best for the benefit of such library."

It is distinctly stated in the will that the bequest to the library is made upon the express condition that the principal sum shall forever remain intact and be invested in such manner as in the judgment of the Board of Directors will produce the best income, due regard being had to the safety and security of the investment, "and that only the income or revenue of such principal sum invested" shall be used by the library in such manner as in the judgment of the Board of Directors will promote its benefit and further the purposes of its organization.

We are of the opinion that under this will the Board of Directors has not the power to use the principal of the fund in constructing any building to be used as a library. The board, of course, has authority to use the principal in erecting buildings that will produce a revenue, and has ample authority to use the revenue for the purposes of the library.

Herewith we return copy of the will that accompanied your letter.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

DECEMBER 29, 1904.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Answering letter from your department dated December 12, 1904, transmitting "for opinion as to validity invoices for

\$1,454.71 and \$1,531.68 of the Chicago Terminal Transfer Railroad Company, being claims on account of material in tracks in South Fortieth avenue alleged to have been lost or stolen after being removed from place by the City of Chicago and before delivery to the C. T. T. R. R. Co.," I beg leave to say:

On March 18, 1902, the City Council passed an ordinance, drafted by my predecessor, the Hon. Charles M. Walker, reciting the expiration of the rights of said railway, declaring its former ordinances forfeited and annulled and repealing the same in so far as they granted any right to maintain or operate street railway tracks upon any portion of any street within the limits of the City of Chicago. Section 2 of said ordinance declared the tracks of said company (including the track in South Fortieth avenue described in said invoices) a public nuisance. Section 3 ordered said tracks to be removed by the company within twenty days, and in the event of its failure to comply with the order, the Commissioner of Public Works was directed to remove them. Section 4 directed the Corporation Counsel to institute such legal proceedings as he might deem proper. Litigation then ensued between the city and said company, in which it was finally determined by the Supreme Court of Illinois, confirming a decree entered by Judge Tuley of the Circuit Court, that the company had no right to maintain such tracks and sustaining the validity of the aforesaid ordinance in all respects. Thereupon, the company refusing to remove said tracks after notice and demand, they were taken up by the Commissioner of Public Works, assisted by Alderman Scully and a volunteer force of citizens, and were piled at the side of the road.

The claim of the company, as evidenced by the warrants above referred to, is for the value of such part of the material formerly constituting said tracks as was "lost or stolen" after removal "and before delivery to the company." The city was under no obligation to deliver said tracks to the company, and acted wholly under the authority of said ordinance and said decision of the Supreme Court, and in so doing were merely abating what had been declared by the Council and the Court to be a nuisance. No liability can arise from such

action on the part of the city. On the other hand, a warrant ought to be presented to said company for the expense incurred by the city in removing said tracks and the cost incurred in restoring the surface of the street to a condition fit for public travel.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

DECEMBER 31, 1904.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

In answer to your favor of December 27th, 1904, asking for an opinion with regard to the calling of special assessment bonds for payment in advance of maturity, I beg leave to say:

On March 21st, 1902, in answer to a request from you, I wrote an opinion in which I discussed the law in regard to the calling of bonds under Section 43 of the Local Improvements Act. I have re-examined this opinion and adhere to the conclusions then reached. Since that date there has been no change in the statute, but an ordinance has been passed designating you as the officer who should carry out the provisions of said Section 43 in regard to the calling of special assessment bonds for payment before maturity.

The new question which you propound may be restated as follows:

If a regular call made under the provisions of the statute, on or before January 10th, results in the selection of a bond for payment, and enough money is on hand only to make a payment on account of said bond, and funds are received later to the credit of the same installment from which the bond is payable, can said moneys be applied to the payment of the bond already called and on which a partial payment is made, or will it be necessary to make by lot a new call and apply the subsequently received money to the bond which may be selected by lot at such new call?

I am of the opinion that where a bond is regularly called, pursuant to the statute, on or before January 10th, said bond

is called "for payment", and that if subsequently money is received to the credit of the same installment out of which said bond was made payable, no new call should be made, but said money should be applied to the payment of the bond first called. The presumption of the law is that the call will result in the extinguishment of the bond, and if it turns out that there is at the time of the call an insufficient amount of money for that purpose, I see no reason why said bond should not be regarded as having a status established by the call which entitles said bond to be paid not only out of the money in hand at the time of the call, but out of the money received to the credit of the same installment thereafter. Statutes must be so construed as to effectuate the reasonable intent of the framers, and we may presume that when they used the language "called for payment" they meant to effectuate an extinguishment of the bond so called, and that they did not have in mind a method of subsequent calls, which would perhaps result in making partial payments upon several bonds of the same series, the consequence of which would be to make said bonds less desirable for investment and lower their market value.

Your second question may be restated briefly as follows:

Does the conclusion which you have reached in regard to bonds called on or before January 10th apply to bonds subsequently called?

I have already stated in the opinion above referred to that these calls held after January 10th are informal, and that the owner of a bond so called cannot be compelled to receive his money; but since the holders of special assessment bonds have uniformly been willing to accept payment of said securities, the money being available for immediate reinvestment in other similar bonds, the practice of making such voluntary calls is, in my opinion, entirely justified by the large saving which it effects to the special assessment fund. The transaction, however, should be regarded as an entirely voluntary one, in which neither party can compel the other to act.

If, therefore, the owner of a bond called for payment after January 10th is willing to accept payment of the same in whole or in part, and is willing to accept subsequent pay-

ments thereon as they are received, and if such calls are so made and payments so administered as not to produce any deficiency in the administration of the particular fund involved, I am of the opinion that you may apply the same method to such subsequent calls. Of course no call should be made and no payment authorized which operates to produce a deficiency in the fund for the final prompt payment of all bonds and liabilities payable out of the fund at maturity.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 5, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

November 23d, 1904, W. J. Lloyd, Assistant Superintendent of the Western Union Telegraph Company, addressed a letter to the City Collector in regard to efforts of the license officers to collect license fees from the ticker patrons of his company under the ordinance of November 23d, 1903, known as the "ticker" ordinance. His letter, together with form of application for ticker license, bond and department reports (which were prepared by this office) were at his request forwarded to you, and by you to this department.

I have had several conversations with Mr. Lloyd, and the substance of the entire matter is that the Western Union Telegraph Company is satisfied to take out licenses for the tickers owned and operated by it and used by its patrons under leases, but objects to giving a separate bond in the amount provided by the ordinance for each separate ticker.

I have examined the ticker ordinance, and am of the opinion that any applicant for ticker license may include as many tickers in his application as he sees fit, making the required statements as to such tickers, and procuring a license for each ticker, but that only one bond is necessary for all the licenses issued to such applicant.

Mr. Lloyd states that his company proposes to take out from three to five hundred ticker licenses, and it would, in my opinion, be a great hardship to require a separate bond for

each ticker. I return herewith the documents submitted by the City Collector to you—being Mr. Lloyd's letter and the form of application, form of reports for city officers, and form of bond.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 5, 1905.

TO THE COMMITTEE ON LOCAL TRANSPORTATION OF THE CITY COUNCIL.

Gentlemen:

Pursuant to the vote of your honorable body at its last meeting, I have the honor to submit you herewith an ordinance, prepared as the result of the joint labors of myself and your chairman, Hon. Milton J. Foreman, to compel the issuance of transfers between street railway companies where the lines of one company have been sold or leased to another company, and where the obligation to issue and receive transfers would exist, under present ordinances, if such lease or transfer had not been made.

I think it is manifest that where a street railway corporation is given the right to operate lines of street railway by a municipality, subject to the right of the municipality to regulate the fares of such company, or to compel it to issue transfers to passengers on its lines, the obligation and duty thus conferred ought not to be escaped by reason of the sale or lease of such rights to another company; for example: The Chicago City Railway Company was given authority to operate street railways in the south and west divisions of the City of Chicago. Its west side lines were sold to the Chicago West Division Railway Company. If those lines were still being operated by the Chicago City Railway Company it would be under obligation to issue transfers between its south side and west side lines; for example, between State or Clark streets and Madison or Van Buren streets. This ordinance

goes no further than to declare, in conformity with the decision of the Supreme Court of Illinois in the "transfer" cases, reported in 199 Ill., that the obligations of the company shall not be affected by said transfer or any lease or operating agreement, but that both companies shall be under the same obligation as if such transfer, lease or operating agreement had not been made.

The ordinance herewith submitted grows out of your order to consider and present to your honorable body an ordinance for universal transfers and is a first step in that direction.

Inasmuch as it may be claimed that the city can exercise its police power only by a general ordinance operating upon all street railway companies within the City of Chicago similarly situated, and since such general ordinance would compel transfers between the city companies and independent outlying lines; for example, the Calumet Electric Street Railway Company and the South Chicago City Railway Company, and since the litigation which would ensue to enforce the issuance of such universal transfers would be complicated with the question of whether or not such ordinance was a reasonable exercise of the police power, I have deemed it more prudent, particularly in view of the fact that your committee has not considered the questions of policy involved in such case, to confine this ordinance to the compelling of transfers in such manner that the case might be presented to the courts for adjudication without the complications which would arise in enforcing the prior ordinance. It will also be observed that in the enforcement of this ordinance transfers would be compelled by the Chicago City Railway Company and the Chicago Union Traction Company between the lines of the former company on State and Clark streets and the lines of the latter company on Lake, Randolph, Madison, Van Buren and Twelfth streets; and it will also be observed that a passenger from the said City Railway Company lines who becomes by the issuance of a transfer ticket a passenger on any of said Union Traction Company lines, will then be entitled to a subsequent transfer over any of the other of the Union Traction

Company lines; so that this ordinance in its operation will work out a very broad system of transfers.

I do not mean to hold that this is by any means the measure of the city's power, but simply present it as a first step, which is in harmony with existing decisions of our Supreme Court, and may therefore confidently be expected to receive judicial sanction, and which will present the matter to the courts for determination in the simplest and most advantageous form.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 5, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I have received the reports of the Commissioner of Buildings, the Deputy Commissioner of Buildings and the Assistant Fire Marshal, forwarding the reports of subordinates, in regard to the Columbus Theater (Weber Bros. proprietors), and in answer to your inquiry as to the provisions of the ordinances in respect thereto, and the power of the Mayor in the premises, I beg leave to say:

These reports show various infringements of the building and amusement ordinances; that tickets were sold after the seating capacity of the building had been sold out; that additional chairs were placed in the boxes, aisles and balconies of the theater; that persons were allowed to stand and sit in the aisles; that the house was crowded far beyond its authorized capacity; that this occurred on the afternoon of December 31st, and that Mr. Max Weber declined to remedy the existing conditions until the police were called and the curtain rung down; that he repeated the offense at the evening performance of the same date and refused to comply with the demands of the firemen and inspectors until the officials refused to allow the curtain to be raised; that he claims that by reason of litigation which he instituted against the city in the Circuit Court it was determined that the building ordinances did not apply to him; that he is not required to

take out an amusement license, and that no such license exists and therefore cannot be revoked.

Section 1 of Article V. of the Cities and Villages Act gives the City Council, among others, the following powers:

“Fourth—To fix the amount, terms and manners of issuing and revoking licenses. . .

“Forty-first—To license, tax, regulate, suppress and prohibit . . . keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure.

“Forty-eighth—To regulate places of amusement.”

In the exercise of this delegated legislative authority the City Council has passed, among others, the following ordinances:

Chapter 6 of the Revised Code of 1897, entitled “Amusements”, provides as follows:

“100. No person or persons shall give, within the limits of the city, any of the entertainments mentioned in this chapter, for gain, without a license for that purpose first had and obtained from the Mayor, under the seal of the city, under a penalty of not less than fifty dollars and not exceeding two hundred dollars, for each and every violation of this section.
”

“104. The owner or lessee of any hall or theater, in which the entertainments given are, as a rule, of a dramatic or operatic character, . . . shall, on the payment of three hundred dollars to the City Collector, . . . have the occupants of his or their hall or theater exempted from license for one year.”

“112. It shall be the duty of every proprietor or lessee of any theater, hall or other building where public entertainments are given, before he permits any person or persons to use the same for the purpose of giving any entertainment therein for gain, to obtain from the Mayor the license herein required, either in his own name, or in the name of the person proposing to give such entertainment, under a penalty of not more than fifty dollars for each and every violation of this section.”

On January 25, 1904, pursuant to a message which you

addressed to the City Council, the City Council amended the building ordinance by inserting at the end of Paragraph 1 of Section 46 thereof the following:

“No license for the operation of a building of Class V. shall be issued by the officer designated by the ordinance unless the Commissioner of Buildings and the Fire Marshal shall first have certified, in writing, to such officer that such building complies with the building ordinance in every respect.”

(Council proceedings, 1903-04, page 2082.)

Section 52 of the building ordinance as amended January 18th, 1904, reads as follows:

“Upon the report to the Mayor by the Department of Buildings, the Fire Marshal or the Superintendent of Police, that any requirement of this ordinance governing buildings of Class V. or that any order given by them in regard thereto has been violated, or not complied with, in any such building, the Mayor shall revoke the license of such theater or place of public amusement, and cause the same to be closed.

(Council proceedings, 1903-04, page 2070.)

This section was re-enacted as Section A-23 (Council proceedings of July 18th, 1904, page 1130).

Taking up in the first place the claim of Mr. Weber that existing ordinances exempt theaters of his class from the necessity of taking out a license under the provisions of Chapter VI. of the Revised Municipal Code, I am of the opinion that this claim is entirely untenable. Sections 100 and 104 of said chapter, taken together, clearly show the legislative intent that no place of amusement shall be permitted to operate without a license. The purpose of Section 104 is simply to prevent the necessity of taking out double licenses—one for the owner or lessee of the building and another for the manager or proprietor of the theatrical troupe which may temporarily be playing in such theater. The intention of Section 104 is that if the owner or lessee of the building shall have paid a license fee of three hundred dollars, no further license fee should be exacted from the persons in the theatrical business who may from time to time be conducting a theatrical entertainment in such building. The language of this section

clearly shows this intent, for the exemption is to the *occupant* of the theater where the *owner or lessee* shall have paid the gross sum mentioned. In the caption to the paragraph this sum is termed "Annual License." Certainly nothing in Section 104 granting exemption in such cases to an *occupant* could even by implication repeal or amend the provisions of other sections of the ordinance requiring the owner or lessee to take out a license and prohibiting amusements or theatrical performances to be carried on without a license.

I have no doubt whatever with regard to the correctness of these views, but since the point has been raised, it is very easy to remove all doubt by a slight amendment to the ordinance, and I am preparing such an amendment and will transmit it to you for your consideration at an early date.

Taking up for discussion, in the next place, the claim of Mr. Weber that no license has been issued to him and that therefore none can be revoked, I beg leave to say:

After the City Council passed the ordinances above referred to, making additional requirements of those owning and operating theaters, so as to insure the greater safety of the theater-going public, it became apparent that the theaters could not possibly comply with these provisions within six months' time, and thereupon, by Council order, it was provided that upon entering into an agreement to immediately begin the construction required by ordinance, and the giving of a bond and making certain temporary changes, theaters might be permitted to operate pending the completion of the entire reconstruction required by the ordinances. It was during the pendency of such an order that Max Weber, of the Columbus Theater, paid to the City Collector three hundred dollars for an annual license fee, and filed his bond and agreement in accordance with the order. The City Collector informed him that the license could not be issued, for the reason that one of the ordinances, which I have above quoted, required a report from the officials of the building and fire departments that all of the ordinances had been complied with prior to the issuance of the license. He was accordingly given a receipt for the money so paid by him. Later on—early in December—reports were received by the City Collector that

there had been compliance with all the provisions of the ordinances with regard to the reconstruction of the building. Thereupon the City Collector issued the license in due form, according to ordinance, and Weber was notified to surrender his receipt and take the license. This he declined to do, and the license having been thus duly tendered to him, is in the office of the City Collector subject to his orders. In these circumstances I am of the opinion that the situation is the same as though the license had been actually delivered to him. The purpose of the law is to prevent the operation of theaters until the law has been complied with, and upon such compliance, to permit such operation. The piece of paper called "license" is simply documentary evidence that the building ordinances have been complied with and that theatrical entertainments may be given for the public. Refusal on the part of a person to accept such written evidence of the municipal consent can have no effect whatever to limit the rights of the city or to enlarge the rights of the individuals.

If in your opinion the facts and circumstances contained in the reports of the officials of the building and fire departments are sufficient to convince you that the ordinances of the city and the orders of the officials have been violated, you have the same authority to revoke said license as though that document were in the possession of the licensee.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 5, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In accordance with your request that I state for your information the legal status of the permanent improvement bond fund now in existence, and also the right of the city to borrow money for current expenses by means of an issue of bonds, I beg leave to say:

The permanent improvement bond fund referred to is the result of the sale of an issue of bonds which were, by the ordinance authorizing their issue, confined to use for the

making of permanent public improvements within the City of Chicago and for the payment of public benefits judgments.

At the time this issue of bonds was sold the Finance Committee propounded to me a number of inquiries with regard to the use of said fund, and I uniformly held that this money could only be used in paying for permanent improvements. I was compelled to come to the conclusion that it could not even be used in the payment of the current expenses of the Board of Local Improvements, because not all of the expenses of said board were incurred in making permanent improvements. I did hold that the proceeds of said bonds could be used in taking up outstanding and unpaid tax anticipation warrants, the proceeds of which had been expended in the making of permanent improvements, and deemed myself fully supported in this conclusion by the decision of the Supreme Court of Illinois in the case of *C. & A. R. R. Co. v. The People*, 205 Ill., 625. The learned counsel for the City Treasurer, however, Mr. John C. Richberg, took issue with me on this point, and the Supreme Court of this State recently declined to issue a writ of mandamus which the city prayed for, compelling the Treasurer to use a portion of said permanent improvement bond fund for said purpose. The opinion in the case has not yet been written, and the grounds upon which the opinion are founded can only be surmised; but in no event can any portion of said money be used for any other purpose than for the making of or paying for permanent improvements.

You have also asked me to state whether or not the City Council has authority by ordinance to provide for the issuance and sale of bonds, the proceeds to be used for current expenses of the city.

Paragraph 5, Section 1, Article V. of the Cities and Villages Act gives power to the City Council "to borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and for and on such conditions as it shall prescribe."

Until very recently it was the generally accepted view of the profession and of the courts that under this and similar powers municipal corporations might borrow money for cor-

porate purposes and use the proceeds thereof in cases of necessity for current expenses. Recently, however, there have sprung up vague doubts as to the power of the city, as a legal proposition, to borrow money by means of bonds issued for current expenses. The question has not been brought before any of our courts, nor have I been able to find any decisions in sister States bearing directly upon it, but those lawyers who are special students of the law of municipal bonds have insisted upon the insertion in the bond ordinances, and in the bonds themselves, of provisions explicitly prohibiting the use of the proceeds of the sale of such bonds for current expenses, and without such provisions in the ordinances and bonds, the most conservative class of these lawyers have declined to approve the bonds issued. I have never yet seen an opinion from any of these lawyers that a bond issued "for corporate purposes", and without the restricting clauses above referred to, is illegal, or that the proceeds of such an issue of bonds might not in case of necessity be used for current expenses, but in my discussion of this subject the question thus raised in the minds of these lawyers seems to be founded upon the provisions of Article VII. of the Cities and Villages Act, which require an annual appropriation ordinance for "such sum or sums of money as may be deemed necessary to defray the necessary expenses and liabilities of such corporation." It insisted that Article VII., construed with Article V., shows an intent of the Legislature that municipalities should by an appropriation payable from general taxation provide for the payment of current expenses, and that the authority to borrow money for corporate purposes given in Article V., when construed together with the provisions referred to in Article VII., indicates a purpose to authorize money to be borrowed by municipalities for corporate purposes other than current expenses. I do not concur in these views. I think the point has never been considered by those who raised it as one upon which they could have a fixed conclusion, but as a possible conclusion which the courts might reach, which ought, in the abundance of caution, to be eliminated by insisting upon provisions in the ordinances and bonds limiting the use of the money to purposes other than current expenses.

I have no doubt that an issue of bonds for "corporate purposes" would be legal, and that it could be sold, and that the proceeds could be used for current expenses, but whether such bonds could bring as high a price as those limited to use for permanent improvements is a financial question upon which I do not assume to express any opinion.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 6, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

After a thorough examination of the records of the Town of Lake and the Village of Hyde Park and the ordinances of the city, we are satisfied that it is not the duty of the city to refund anything on account of special assessments levied by either of those municipalities prior to annexation, or by proceedings begun prior thereto, for the laying of water pipe, and, therefore, that the ordinance of January 4th, 1904, does not entitle persons paying such assessments to new water pipe extension certificates or refunds.

As to cases originating in any of the other municipalities that have since been annexed to the city, all we can say at present is that we have not been able to find anything casting upon the city the burden of refunding anything on account of special assessments levied for the laying of water pipe in any of those municipalities, and we, therefore, advise you not to issue any new certificates in lieu of certificates issued by such municipalities until the holders have shown clearly that they are entitled to the new certificates.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

JANUARY 11, 1905.

MR. L. E. GOSSELIN, Auditor and Deputy Comptroller.

Dear Sir:

In the matter of your request for an opinion as to the liability of the city for interest upon the amount taxed as costs against the city in judgments rendered against it, we have to advise you that in our opinion, inasmuch as the judgments rendered by the Federal courts include the item of costs in the total amount of the judgment rendered, the costs are thereby merged in the judgment with the principal debt, and the liability of the city for interest on the costs as so included in those judgments is fixed beyond question.

In the State courts a different practice prevails,—the court renders judgment for the principal debt, and by a subsequent clause determines that the plaintiff recovers his costs to be taxed against the city. The process for the collection of a judgment against an individual or private corporation in the State court is an execution, and by the terms of the statute the officer receiving such execution is directed to collect interest on the judgment, that is, on the principal debt, from the date of its rendition. The process for the collection of costs is an execution, but the statute does not make this particular execution a warrant for the collection of any interest. As the statute provides one writ for the collection of the judgment proper, and directs the officer to collect interest upon that debt, and provides another writ for the collection of the costs and does not direct the collection of interest on the costs, we are of the opinion that judgments for costs in the State courts do not bear interest.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

JANUARY 12, 1905.

MILTON J. FOREMAN, Esq., Chairman Committee on Local
Transportation, of the City Council.

Dear Sir:

In compliance with your request that I examine a draft of an ordinance introduced by Alderman Wm. E. Dever and referred to your committee, with an opinion as to its validity, and that I re-draft the same, if deemed advisable, so as to procure desirable changes in the form thereof, I beg leave to say:

The first two sections of said ordinance legislate with regard to the same subject matter as an ordinance which I transmitted to the City Council on October 3, 1904, in accordance with a request from that body dated August 24, 1904. (See Council proceedings of 1903-04, page 1202.) This ordinance was referred to your honorable body and is still pending there. I have therefore eliminated from my re-draft any reference to the subject of trailers and special conductors for each car.

In my opinion, the City Council, in exercising the police power of the municipality, may prescribe the temperature to be maintained within public conveyances and prescribe reasonable means for making this exercise of its police power effective. The ordinance should be general in its terms, operating upon all persons similarly situated. With this end in view I have redrawn the ordinance as an amendment to Sections 1718 and 1719 of the Revised Code of 1897, and beg leave to submit the draft of the said amendment herewith.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 12, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In answer to your verbal inquiry and supplementing my opinion of January 5, 1905, in regard to the Columbus Theater, I beg leave to say:

There can be no doubt of the correctness of your posi-

tion that an efficient remedy now exists to prevent the overcrowding of theaters by instructing the firemen and inspectors on duty at theaters to ring down the curtain and stop the performance at the first evidence of a breach of the law in this respect. The courts would sustain you to the uttermost in the use of this remedy.

Your particular inquiry, however, is whether this remedy does not prevent the exercise of your right to revoke the license of a theater for offenses against city ordinance, in view of the fact that an absolute compliance with these ordinances can be enforced by the remedy first referred to above.

It seems to me perfectly clear that these two remedies are cumulative. The first remedy is designed to be administered by subordinate ministerial officers (for example: firemen, policemen, inspectors). If these subordinates carried out your instructions to enforce the law to the letter and to ring down the curtain on the slightest infraction of the law, there would be no occasion for you to exercise the second remedy—revocation of the theater license. That remedy, however, is given to you for use in cases where the subordinate officials fail to perform their duty, or where the licensee, notwithstanding the remedies given to subordinate officers, commits such breaches of the theater ordinance as show him to be an unfit person to be trusted with the care of the theater going public. In short, the framers of the theater ordinance have intended to create a double safeguard and to make each as efficient as possible; the remedy by ringing down the curtain and closing the theater to be exercised by subordinate officers for the purpose of preventing an infraction of the law, the remedy by revocation to be exercised by the Mayor for the purpose of punishing those infractions of the law which are committed, notwithstanding the exercise of the preventive remedy or because that remedy was not effectively employed by the subordinate officers. In a secondary sense the remedy by revocation of the license is a preventive remedy also, in so far as it affords a weapon for driving out of the business

persons unworthy to be charged with its duties and responsibilities.

Very respectfully,
 EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 13, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

July 11, 1900, a contract was entered into by the city for the construction of the East Division Street Bridge (Canal Bridge), which bridge was opened in 1903.

Your department then prepared an estimate of the cost of the construction of said East Division Street Bridge, and, upon the theory that the North Chicago Street Railway Company was (by the ordinance of the City of Chicago under which said company constructed its roads in said portion of Division street) liable for one-half the original cost of said East Division Street Bridge (Canal Bridge), a warrant for collection was sent by you to the Comptroller's office for \$106,184.49 against the Chicago Union Traction Company.

This department, construing an ordinance of December 20, 1886, as requiring the said North Chicago Street Railway Company to so pay one-half the original cost of the construction of a bridge over the canal at Division street, attempted to collect the same from the company.

The attention of this department was then called to the fact that the railroad company did not construct its road under said ordinance of December 20, 1886, and that said ordinance was never accepted by the company and never became a contract, but that the company constructed its said road in said portion of Division street under an ordinance of March 14, 1887, which it accepted April 4, 1887. Said ordinance does not provide for the payment to the City of Chicago by said company of any portion of the original cost of said bridge, nor for the payment of any money to the City of Chicago as any portion of the cost of maintenance of said bridge, but said ordinance does provide, by Section 8 thereof:

"The entire roadway of the bridge across the north

branch canal at Division street shall be planked and kept in repair by said company during the period the same is used by said company under this ordinance."

This department, having verified the same, then advised you that the said bill was inadvertently rendered, and that the city could not collect the same for the reasons above stated.

You then prepared, at our suggestion, a bill showing the original cost of construction of the West Division Street Bridge (North Branch Bridge), and apportioning one-half thereof—the sum of \$138,221.95—as due from the North Chicago Street Railway Company, under the term of said ordinance of March 14, 1887, referred to above. Section 1 of said ordinance of March 14, 1887, so far as material to be quoted in this regard, is as follows:

" . . . Provided, that if the City of Chicago hereafter, during the term of the license hereby granted, provide by ordinance for the construction of new bridges over the *north branch of the Chicago River at Division street* and at North avenue, to be used and to take the place of the present and existing bridges over said river at said points, the said company, in consideration of the license hereby granted, *agrees to pay to the City of Chicago one-half of the first cost of each of said bridges, including piers and abutments*; provided, that said company shall not be required to make said payment until after the expiration of ten years from the date of the acceptance of this ordinance by said company.

"Said company further agrees, in consideration of the license herein granted, to pay to the City of Chicago the sum of two hundred and fifty (\$250) dollars per annum towards the cost of maintaining the bridge *over the north branch of the Chicago River at Division street*, . . . said payments to date from the date of the laying of tracks across said bridges by said company."

This bill, amounting to \$138,221.95, was, on December 31, 1904, delivered to the Chicago Union Traction Company, and the said company has to-day, by Mr. Gurley, its legal representative, and by Mr. John M. Roach, its general manager, admitted its liability for the payment to the City of Chicago of one-half of the original cost of the construction of

said Division Street Bridge over the north branch of the Chicago River; and said gentlemen have stated that they would cause the items of expense therein contained to be immediately checked up by the company, if the same have not already been done, and arrange for the payment of the said amount, if that is correct, or whatever amount may be found to be correct, to the City of Chicago.

I respectfully suggest that you have the said warrant for \$106,184.49 for one-half of the cost of the construction of the East Division Street Bridge, which you caused to be prepared and transmitted to the Comptroller for collection, cancelled.

The ordinance of December 20, 1886, above referred to, is printed on page 1481 et seq., Vol. II, of the Code (Special Ordinances), and the ordinance of March 14, 1887, is printed on page 1486 et seq., Vol. II, of the Code (Special Ordinances).

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

JANUARY 14, 1905.

MR. L. E. STANHOPE, Deputy Commissioner of Buildings.

Dear Sir:

April 11, 1904, you requested an opinion of this department as to whether or not you could compel "the owners of old apartment buildings who had but one stairway to erect additional stairs as a matter of safety to life in the event of fire occurring." April 22, 1904, we rendered an opinion to you on this proposition, which was stated in the abstract and considered as such by us. We have since learned that you have under our said opinion notified the Pullman Company to erect an additional stairway in certain buildings owned by them which are three stories in height and in which the only means of ingress and egress to the various apartments is by a single stairway in the center of the building. In your

communication of November 26, 1904, in which you advised us of your said notification to the Pullman Company, you stated that as the construction of an additional stairway was a difficult and expensive proposition, you had to agree to accept an iron ladder fire escape from each apartment as a substitute for the stairs, and that the real estate agent for the Pullman Company practically agreed to install the iron ladder fire escape and you had presumed it would be done when you received the letter from the Vice President of the company which notified you to the contrary.

The provisions of the Tenement House Ordinance as to the requirements for fire escapes and stairs is confined to the following sections:

“Sec. 3. Fire Escapes in Buildings Over Three Stories—Access to—Metal Stairways, Courts, etc.—Every non-fire-proof tenement house more than three (3) stories and basement high shall be provided with a fire escape or fire escapes, such as are required by the statutes of Illinois and the ordinances of the City of Chicago. In every case each separate apartment shall have direct access to at least one (1) such fire escape unless such apartment shall have direct access (without passing through any other apartment) to at least two (2) separate flights of stairs leading to the ground, one of which is placed in the front and one in the rear of such building, one of which may be placed outside of the building; but where such separate apartment shall not have access to two (2) such flights of stairs, then there shall be a metal stairway between the balconies of every such fire escape, securely fastened to the walls of the building, not less than two (2) feet wide, with a proper hand-rail, instead of the usual vertical ladder. Every court in which there shall be a fire escape shall have direct and unobstructed access along the surface of the ground to a street, alley or yard, opening into the alley or street, without entering into or passing through or over any building unless by a four (4) foot wide fireproof passage on the court or ground level.”

“Sec. 6. Stairs and Halls in Case of Alteration. Requirements.—Every new tenement house shall have at least two (2) flights of stairs, which shall extend from the entrance

floor to the top story. Such stairs and the public halls in every new tenement house shall each be at least three (3) feet wide in the clear, and every apartment shall be directly accessible from an entrance hall by means of at least one such flight of stairs. If any existing tenement house be so altered as to increase the number of apartments therein, or if such building be increased in height, or if the halls and stairs therein be damaged by fire or otherwise to an extent greater than one-half the value thereof, the entrance, stair halls, entrance halls and other public halls of the whole building shall be made to conform to the requirements of this ordinance as to new tenement houses.

“Sec. 8. Stairs in Non-Fireproof Buildings, 80 to 120 Rooms.—Every new non-fireproof tenement house containing over eighty (80) rooms, exclusive of bath rooms, shall have one additional flight of stairs (over and above the flights hereinafter provided for) for every additional eighty (80) rooms, exclusive of bath rooms, or fraction thereof; but if such building contains not more than one hundred and twenty (120) rooms, exclusive of bath rooms, at the owner's option, in lieu of an additional stairway, the stairs and public halls throughout the entire building shall be at least one-half wider than is provided in Sections 6 and 13 of this ordinance.

“Sec. 9. Stairs in Fireproof Buildings, 120 Rooms and Upwards.—Every new fireproof tenement house containing over one hundred and twenty (120) rooms, exclusive of bath rooms, shall have one additional flight of stairs (over and above the flights hereinbefore provided for) for every additional one hundred and twenty (120) rooms or fraction thereof; but if such building contains not more than one hundred and eighty (180) rooms, exclusive of bath rooms, at the owner's option, in lieu of an additional stairway, the stairs and public halls throughout the entire building shall be made at least one-half wider than is provided in Sections 6 and 13 of this ordinance.

“Sec. 11. Stairs and Stair Halls—Over Three Stories—Fireproof Glass.—The stairs and stair halls in all new tenement houses more than three (3) stories and basement high shall be constructed of fireproof material throughout, except

that the treads of stairs (not less than one and three-fourths ($1\frac{3}{4}$) inches thick) and all handrails may be of hard wood. All windows in stair halls opening on inner courts or shafts shall be of good quality fireproof glass."

You will observe that the provisions of Section 3 requiring fire escapes is confined to non-fireproof buildings over three stories and basement high; that the requirements for "at least two flights of stairs is confined to new tenement houses" (see Sec. 6); that the requirements of Section 8 for stairs in non-fireproof buildings containing over eighty rooms is confined to "new" non-fireproof tenement houses; that the provisions of Section 9 for stairs in fireproof buildings containing over 120 rooms is confined to new fireproof tenement houses; that the provisions of Section 11 for fireproof stairs is confined to "new tenement houses more than three stories and basement high." Section 1 of said Tenement House ordinance defines the term "new tenement house" as including "(a) every tenement house hereafter erected for which ground has not been broken (under a building permit heretofore issued) prior to the day of the taking effect of this ordinance, and includes every such new tenement house as shall be increased or diminished in size or as shall be otherwise altered after its erection, and (b) every building now or hereafter in existence not now used as a tenement house, but hereafter converted or altered to such use."

If the fact be that the buildings in question are not new tenement houses, as defined by the ordinance and are not more "than three stories and basement high, then under the provisions of said ordinance you have no power to require the construction of fire escapes or additional stairs notwithstanding the fact that in your opinion the present condition of such buildings is dangerous to life. If, however, said buildings or any of them should be altered, then you would at that time, under the definition of the term "new tenement house" be authorized to require the construction of the necessary stairs.

The provisions of Section 57 of the Tenement House Ordinance does not confer power upon you, even though "the immediate safety of occupants of buildings is concerned"

to require alterations therein, but the proper interpretation of said section is that any alteration required by the tenement house ordinance need not be made unless the immediate safety of the occupants of the buildings is concerned. The scope of said section is to limit rather than to enlarge the requirements of the ordinance.

Very truly yours,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

JANUARY 16, 1905.

TO THE MAYOR AND CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

At the last meeting of your honorable body a resolution was introduced by the senior alderman of the Twenty-seventh Ward that the Corporation Counsel be directed to demand of the Northwestern Elevated Railroad Company the sum of \$87,500 liquidated damages provided for in Section 10 of the ordinance of January 8, 1900, and upon failure to pay said sum within a certain time fixed in the resolution, that the Corporation Counsel be directed to bring an action at law against said company for the recovery of said sum. This resolution is referred to on page 2012 of the current Council proceedings, and it there appears that said resolution and the pending Northwestern Elevated Railroad Company's Ravenswood Extension Ordinance were made a special order for your next regular meeting, and that the Corporation Counsel was requested to "render an opinion as to the necessity of the passage of the Butler resolution in order to make collection of forfeiture of \$87,500 from the Northwestern Elevated Railroad."

Section 27 of Article I of Chapter IV of the Revised Code of 1897 gives the Comptroller authority to institute or discontinue legal proceedings in which the interests of the city are involved, where he thinks the city interests require it, and to employ additional counsel in special cases.

In certain instances the law department has deemed it advisable to have council authority for the bringing of a suit the purpose of which was, not to collect money but to forfeit ordinance-rights and privileges, and has recommended the passage of council orders giving such authority,—notably in the case of the cross-bill filed by me against the Northwestern Elevated Railroad Company for the purpose of annulling and having declared void its rights on the “down-town loop.”

While the passage of an order by the council in regard to the prosecution of a suit for the collection of a money demand can do no harm, yet, literally and strictly answering your question as propounded, I beg leave to say, with great respect, that such action on the part of your honorable body is not necessary, in view of the provisions of Section 27 above referred to granting power in such cases to the Comptroller.

I forbear to express in this communication any opinion with regard to whether or not such suit should be instituted, for the simple reason that your very carefully worded question asks for no opinion on that subject.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 16, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

In answer to your question as to whether or not a right of action exists in favor of the city against the Northwestern Elevated Railroad Company for a breach of the provisions of Section 10 of its amendatory ordinance of January 8, 1900, I beg leave to say:

Said Section 10, so far as material to be quoted, is as follows:

“Section 10. That Section 10 of the ordinance of January 8, 1894, be and the same hereby is amended so that the contemplated extension of the railroad of the said Northwestern Elevated Railroad Company, from Wilson avenue to the city limits, as in said original ordinance provided, may be in a westerly or northwesterly direction for a distance of, to-

wit, three and one-half miles from a point on the main line of said railroad north of Montrose boulevard, such extension or the one from Wilson avenue to be so constructed on or before the 1st day of January, 1905, such extension to be upon, along and over such land as may be acquired by the said Northwestern Elevated Railroad Company by lease, purchase, condemnation or otherwise, and the right is hereby given to cross any street, alley or public way which may cross the said route selected for the said extension. The said company, in the event of its failure to so construct an extension, to pay into the treasury of the City of Chicago as liquidated damages for its failure to complete said road, the sum of \$25,000 for every uncompleted mile of such railroad."

(Council proceedings of 1899-1900, p. 2157.)

The ordinance of January 8, 1894, referred to in said Section 10, provided for a line from the center of the city to the northern city limits; that part of said line to Wilson avenue to be constructed within three years from the acceptance of the ordinance, and the extension thereof from Wilson avenue to the city limits to be constructed within ten years from the acceptance of the ordinance.

Numerous ordinances were passed from time to time amending this original ordinance, extending the time for the completion of various parts thereof and authorizing substitute routes. It is not material to consider any of these ordinances except the ordinance above referred to of January 8, 1900. Section 10 of said ordinance is set out in full, and it will be observed that it furnished an alternative route for that provided in the original ordinance of 1894, which, instead of running north from Wilson avenue, should "be in a westerly or northwesterly direction for a distance of, to-wit, three and one-half miles from a point on the main line of said railroad north of Montrose boulevard." Montrose boulevard is two blocks south of Wilson avenue. The ordinance then provided that the branch from Montrose boulevard or that from Wilson avenue, both of which were authorized to run in a northerly or northwesterly direction, should be constructed on or before the first day of January, 1905. It should be observed that this ordinance contemplated the ex-

tension to be built upon such land as should be acquired by said railroad company by "lease, purchase, condemnation or otherwise," and the right was given by this ordinance "to cross any street, alley or public way which may cross the said route selected for the said extension." The former ordinances contain ample provisions as to the kind of structure that should be constructed, and certainly contain sufficient legislation on that subject so that the provisions of the ordinance of 1900 (taken together with prior ordinances) might have been availed of without further legislation on the part of the City Council.

May 11, 1903, an ordinance was introduced into the City Council providing for a slightly different extension, in lieu of those set out in the ordinance of 1900. (Council proceedings, 1903-04, page 88.) The point of beginning was fixed "near Graceland avenue and running thence west to a point on Irving Park boulevard between the right of way of the Chicago & Northwestern Railway Company on the east and Lincoln street on the west, thence north to a point between Lawrence avenue on the north and Montrose avenue on the south, thence west to a point west of Western avenue." This department was asked for an opinion upon said ordinance, and addressed a communication to the Committee on Local Transportation pointing out numerous defects therein. The property owners also appeared before said committee and presented their objections to the route therein authorized. The whole matter was discussed by said committee at numerous meetings, and as a result of long continued consideration of the question, this department was requested, on behalf of the committee, to draw a new ordinance along certain lines determined by the committee. The ordinance so prepared by this department was reported by the committee to the council on May 28, 1904, and deferred and published (current Council proceedings, page 362). Finally said ordinance came on for passage on July 11, 1904, several amendments were proposed, some adopted and some rejected. (See current Council proceedings, page 929 et seq.) Said ordinance as amended and passed appears in the current Council proceedings, beginning at page 932. Section 11 of said ordinance

(current Council proceedings, page 937) provided for the release of said Elevated Railroad Company from the payment of \$25,000 a mile for each uncompleted mile of road referred to in Section 10 of said ordinance of January 8, 1900, and recognized the Ravenswood extension route in said ordinance described as a substitute for the route authorized in the prior ordinances.

July 18, 1904 (current Council proceedings, page 1077), you returned this ordinance to the council without your approval, with a message stating your reasons therefor, to-wit: that the president and general counsel of said road stated to you that it would be impossible for said company to accept said ordinance with the provisions which it contained for universal transfers, half-fare for children and the requirement of a station at Willow street. A motion to reconsider said ordinance prevailed, and a motion to pass the same over your veto failed of passage. At the same meeting, upon the call of wards, Alderman Blake reintroduced the ordinance, together with certain amendments thereto, the same being the amendments proposed by you in your veto message, and the ordinance and the amendments were referred to the Committee on Local Transportation (Council proceedings, page 1108.)

November 21, 1904, that committee reported recommending the passage of the ordinance with said amendments, which said ordinance is published at page 1568 of the current Council proceedings. Said ordinance was called up for passage and passed December 5, 1904 (current Council proceedings, page 1817).

December 12, 1904, you returned this ordinance to the council without your approval, together with a message stating your reasons therefor. In this message you stated that, in view of charges that had been made of improper influences exerted in the passage of this ordinance, you believed "the public interests would be best conserved by reconsidering the vote by which the ordinance was passed and by deferring further action thereon until the investigation now in progress shall be complete and final;" and you further said: "I wish to add with all the emphasis at my command that neither prior to the making of the charges nor

since have I heard even a hint of any improper influence having been used to secure the passage of the ordinance." (Current Council proceedings, page 1833.)

The vote by which said ordinance was passed was then reconsidered and action deferred until the completion of said investigation. Section 11 of said last mentioned ordinance is the same as Section 10 of the ordinance reported by the Committee on Local Transportation on May 28, 1904.

It is perhaps necessary, in order to make a complete statement of the case, to revert to the well known fact that none of these various extensions have been constructed, the road now terminating on the north at Wilson avenue.

You request my opinion as to whether or not the city can successfully maintain an action to recover this sum of \$87,500, and you particularly invite my attention to the question whether or not the facts and circumstances above referred to amount to an estoppel against the city.

I am of the opinion that since the ordinance of January 8, 1900, was complete in itself, and vested the company with the right to build the contemplated extension referred to in Section 10 of said ordinance without further legislative action on the part of the city, and since no such extension has been constructed, and the date therein fixed for such extension has passed, these circumstances make out a *prima facie* case for the recovery against said company of the sum of money which, by the acceptance of said ordinance, it agreed to pay into the treasury of the City of Chicago as liquidated damages for its failure to complete said road.

I am also of the opinion that the facts and circumstances above stated with regard to subsequent ordinances and the subsequent negotiation between the Committee on Local Transportation and the company for a modification of the ordinance of January 8, 1900, do not strictly come within the technical rules governing the application of the doctrine of estoppel. The situation of the company has in no manner been changed by anything which the City Council has done. The fact that the company has been negotiating with the Committee on Local Transportation for a new contract to take the place of the existing contract could not constitute an

estoppel, because all parties are contemplated to have known that only the final action of the City Council itself could change the relation of the parties.

I have no doubt, however, that the facts and circumstances above stated may all be taken into consideration by the City Council in determining what its future action will be. I think that the question of the future action of the council is a legislative, and not a legal, question.

It was decided by the Supreme Court of Illinois in the case of *Chicago City Railway Company v. The People ex rel. Story*, 73 Ill., page 541, that the City Council had the power to waive the forfeiture of rights granted by it through ordinances, even after the time had expired within which the company was obliged to act; and in a case where, not the payment of money, but the forfeiture of valuable street railway rights was concerned.

I suppose there could be no debate on the proposition that prior to January 1, 1905, the City Council, with the consent of the Northwestern Elevated Railroad Company, had the right to pass an ordinance extending the time within which the extensions of said road could be built, and changing the route of such extensions; and if the contract was so changed by mutual consent before the payment of any sum of money became due thereunder, there would be no question of forfeiture.

Under the decision of the Supreme Court of Illinois in the Story case above referred to, I see no reason why, by mutual consent, the City Council and the Northwestern Elevated Railroad Company may now modify their contract, —the city extending the time within which the extension may be built, and agreeing to take an extension on a different route from that formerly contracted for; and if this should be done and the new and modified extension completed within the time fixed by the modified contract, I believe the courts would not sustain a recovery of the liquidated damages contracted for in the ordinance of 1900. In other words, I believe that now, in the present circumstances, the entire question is a legislative one, in which the City Council has the power either to insist upon this forfeiture (in which case it

could not insist upon the construction of any of the extensions referred to), or, if it deems the construction of these extensions to be of such importance to the public as to warrant the modification of the contract and the carrying out of the purposes and intents evidenced by the various amendatory ordinances above referred to, I think it undoubtedly has the right so to amend said ordinance-contract, with the consent of the railroad company, and thus release said company from the payment of said liquidated damages. In other words, the question in its last analysis is this:

Does the City Council prefer to insist upon the forfeiture of \$87,500 and give up this opportunity of obtaining additional transportation facilities for its citizens, or does it prefer to secure these transportation facilities and forego the collection of the penalty?

In my opinion, the city cannot equitably demand both of these alternatives.

I am not unaware of the fact that an argument may be founded upon the provisions of Section 172, Ch. 24, R. S. Ill. (Hurd's Ed.), authorizing the bringing of a suit by any taxpayer to recover "any money or property belonging to the city or village which may have been paid, expended or released without authority of law." This statute has often been rightly construed to prohibit the City Council from giving away the money of the city, and to make such gift inoperative by providing for a suit by a private individual where the corporate authorities are derelict in the discharge of their duty; but really this question all comes back to the proposition whether or not such action on the part of the city amounts to a release without authority of law.

The decision of the Supreme Court in the Story case above referred to seems to me to be conclusive that these ordinance-contracts may be modified even after the expiration of the time within which the grantees or beneficiaries in such ordinance were to have performed their part of the obligation therein, and whether this obligation be the construction

of a railway or the payment of a sum of money seems to me to make no difference.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 16, 1905.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF
CHICAGO.

Gentlemen:

At the meeting of your honorable body held December 19, 1904, an order was introduced by Alderman Johnson and passed, directing the Corporation Counsel to report at the next regular meeting what progress had been made in complying with the order passed June 29, 1903, and published on page 632 of the Council proceedings; said order is as follows:

“ORDERED, That in compliance with Section 2101, on page 480 of the Revised Code, the Corporation Counsel shall institute such proceedings as will enforce the ordinance pertaining to the removal of railroad tracks from the surface of streets and highways within the limits of the City of Chicago, passed by the City Council of the City of Chicago, February 23, 1893.”

Section 2101 of the Revised Code of 1897, is a part of a general compulsory track elevation ordinance beginning on page 473 of the code and running to page 480. In brief, it divides the city into three districts; fixes dates in each district within which tracks shall be elevated; names a date after which it shall be unlawful in each district to permit railroad tracks to remain or be used upon any street or highway within the city limits; declares the maintenance of surface tracks after said certain dates to be a nuisance; gives authority to elevate such tracks; provides for a temporary operation of surface roads connecting the various districts; prohibits all grade crossings subsequent to the time designated in the ordinance, and fixes penalties for breaches thereof.

Section 2101 above referred to merely makes it the duty of the Corporation Counsel to prosecute suits arising under

the ordinance. This ordinance was passed ten years before I assumed the duties of my present office. It has never, so far as I can learn, been enforced in a single instance. None of my predecessors, so far as I know, have ever instituted any suit thereunder. Nor has any action been taken under it by any official of the city or any member of the City Council, so far as I can ascertain, prior to the passage of Ald. Johnson's order. On the contrary, immediately after the passage of this ordinance negotiations were entered into with the railroads for specific contract ordinances for the elevation of their respective roads, dealing in each instance with specific lines in a specific manner. An immense amount of work has been accomplished through these contract ordinances, and a stupendous sum of money has been expended by the railroad companies in the elevation of miles of track and in the elimination of hundreds of grade crossings. It seems quite clear that the city for the purpose of accomplishing in a practical way the elevation of tracks has chosen to accomplish its purpose by amicable negotiations instead of resorting to the delays, expense and uncertainties of litigation.

Moreover, on December 12, 1904, an ordinance was introduced into your honorable body repealing said ordinance of February 23, 1893, and this ordinance was referred to the joint Committee on Judiciary and Track Elevation and still remains pending and undetermined.

The only steps that the law department could under any circumstances take to enforce this ordinance would be the bringing of suits against every railroad within the city limits operating its cars over surface tracks. It could not institute any suit under said ordinance to specifically compel the elevation of tracks.

In view of the facts above stated, and particularly the uniform adoption of the method by amicable negotiation and the pendency of the repealing ordinance, I should certainly deem it improper to enter upon any general campaign for the collection of these penalties, without a specific order from your honorable body, after due consideration of the facts herein above stated.

I am not to be understood as expressing any doubts as

to the legality of this ordinance. This communication is intended merely to advise your honorable body of the exact situation, and then to express my entire willingness to proceed in the future in accordance with your determination.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 16, 1905.

MR. JOHN ERICSON, City Engineer.

Dear Sir:

Under date of December 19, 1904, you addressed a letter to this department which reads as follows:

"The middle or boulevard portion of the Ogden avenue viaduct has been in rather bad condition for a number of years, and a few months ago this part was barricaded as it was considered unsafe for traffic. About two years ago the various railroad companies owning tracks underneath the viaduct repaired the two roadways north and south of the portion in question at the city's request, but nothing was done on the boulevard roadway, the railroad companies maintaining that it is a matter for the park board and outside of the city's jurisdiction. As this is a purely legal question, I respectfully ask your opinion as to what can be done in the matter. The following railroad companies are involved: C. & N. W., C. T. T., P. C. C. & St. L., and the Chicago Union Stock Yards Transit Co. A sketch of the portion to be repaired is attached hereto."

In reply thereto I beg leave to say that by ordinance passed January 17, 1887, published on page 503 of the Council proceedings of that date, the City Council transferred to the West Chicago Park Commissioners for the purpose of a boulevard, the center seventy (70) feet of Ogden avenue, between the north line of 12th street and the west line of California avenue, between which points the Ogden avenue viaduct is located. The viaduct was built or completed in 1892, and spans the tracks of the Chicago & Northwestern, the Chicago Terminal Transfer, the P. C. C. & St. L. and the Union Stock Yards and Transit R. R. Companies.

The legal status of this viaduct is somewhat anomalous in this, that although the center seventy (70) feet of Ogden avenue had previously been transferred to the Park Commissioners, and was under their exclusive jurisdiction at the time of the construction of the viaduct, yet the viaduct was constructed by the city in conjunction with the railroad companies. It appears that the center forty-two (42) feet of the viaduct were set aside as a boulevard driveway, and have ever since been maintained by the West Park Commissioners, and have been under their jurisdiction.

As between the city and the West Chicago Park Commissioners I am of the opinion that the duty to repair this boulevard driveway is on the Park Commissioners. But this question is in no way material to the question of whether or not the railroad companies are liable for the repair of the driveway. I have not been able to discover an ordinance providing for the construction of this viaduct, except that by ordinance of July 20, 1891 (Special Ordinances, Volume 2, p. 525), it was provided that the Chicago and Northern Pacific Railway Company, the predecessor of the Chicago Terminal Transfer Railway Company, should pay \$40,000 towards the cost of constructing this viaduct, and should save the city harmless from all damages resulting from the construction of the east approach. The ordinance further provides that on the acceptance of it and payment of the sum stipulated, the said railway company should be "relieved from all further obligations in reference to viaducts and approaches thereto at Taylor street, Ogden avenue and 14th street." This language is probably broad enough to exempt said company from any future obligations to pay for maintenance or repairs of the viaducts in question if said company made said payment of \$40,000, and if it has held the city harmless from all damages resulting in the construction of the east approach to said viaduct.

As to the Union Stock Yards and Transit Company, it is possible that under its ordinance of March 19, 1877 (Special Ordinances, Vol. 2, p. 734), it is under obligation to maintain this viaduct, unless modified by any contract made at the time of the construction of the viaduct; in any event I

think there is a common law obligation to contribute towards the maintenance of the viaduct.

As to the Chicago and Northwestern Company and the Pennsylvania Company, my opinion is that they are each under a common law obligation to pay a part of the cost of maintaining this viaduct, unless they were relieved of such obligation by any contract entered into with the city at the time of the construction of the viaduct.

From the foregoing it will be seen that we are of the opinion that the three railroad companies last above mentioned, are liable for the maintenance of this boulevard driveway whether the city or the West Chicago Park Commissioners have jurisdiction over it.

Will you kindly transmit to this office a detailed report of all communications and negotiations which have been had with these companies, and copies of any notices which may have been served upon them, in order that we may be fully advised as to just what attitude the railroad companies take in the matter?

Yours truly,
WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

JANUARY 19, 1905.

MR. CHARLES W. NORDQUIST, Sec'y. Tax Payers' Assn., 35th Ward, 799 N. Kedzie Avenue, Chicago.

Dear Sir:

Your letter of January 9, 1905, addressed to his Honor, the Mayor, has been referred to this department for reply. Your letter reads as follows:

"Last June there was an ordinance passed by the City Council making the district between North avenue, Division, Kedzie avenue and Central Park avenue, a local option district. On the corner of LeMoyne and Homan avenues there is located a dramshop, and would be pleased to have you advise us, how long he can keep his place and what can be

done in order to have him vacat . An early reply will be appreciated."

Replying to your inquiry, I beg to say that the ordinance to which you refer was passed on June 27, 1904, and created a prohibition district in the territory mentioned by you instead of a local option district. The saloonkeeper at the corner of LeMoyne and Homan avenues to whom you refer, has the right to continue in the business until the expiration of the license which he held at the time of the passage of the ordinance. No new license can be issued to him, and, therefore, he will be compelled to discontinue business upon the expiration of his license. He cannot be compelled to discontinue until his license expires.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

JANUARY 20, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have the application of the Chicago Suburban Water & Light Company for a permit to place poles in the alley between Lake street and Fulton street and Lake street and Park avenue, from 52d avenue to West 40th avenue, said poles to be six inches at the top and not less than thirty-five feet high, and to carry wires for electric current of not more than 2,200 volts.

November 12, 1887, the Board of Trustees for the Town of Cicero adopted an ordinance authorizing the Cicero Water, Gas & Electric Light Company to construct, maintain and operate water works, gas works and electric light works for the purpose of supplying to the inhabitants of the Town of Cicero, water, gas and electric light, and therein defined the rights, privileges and powers of said company.

Section 1 of said ordinance, so far as material to be quoted, is:

“ . . . Also the right and privilege of erecting, or having erected, poles or standards of a height to be designated by the Board of Trustees, and connecting therewith a line, or lines, of a single wire or wires, or other electrical conductors, or of laying said wire, wires, or electrical conductors under the ground of any and all streets, together with all necessary attachments, connections and fixtures, either under or above the surface of any and all streets within the limits of said Town of Cicero, for the purpose of conveying and conducting electricity for illuminating, heating, mechanical and other purposes, and to operate, use, maintain, repair and extend the same under, or above the surface of any or all of said streets, within said town, for the purposes aforesaid; said wires and electrical conductors to be thoroughly insulated and made safe, whether above or below ground. To make all necessary excavations and trenches in any and all streets, to erect such poles or standards, as may be required, and to acquire and hold any and all real estate, easements and rights necessary to that end and purpose.”

On or about September 28, 1898, the said Cicero Water, Gas & Electric Light Company conveyed its rights under said ordinance to the Chicago Suburban Water & Light Company, which latter company, has, since that date, operated in the Town of Cicero under said ordinance, and has, since the annexation of a portion of the Town of Cicero to the City of Chicago, applied to and received from the City of Chicago a number of permits for the exercise of the electrical privileges conferred by said ordinance.

You will observe that the portion of the ordinance quoted provides that the height of the poles or standards shall be designated by the Board of Trustees.

Section 1640 of the Revised Code of Chicago of 1897 is:

“In all cases where provision is made by ordinance that the consent of the Commissioner of Public Works shall be obtained to authorize any act to be done, he may grant a permit therefor, subject to the restrictions of the ordinances in relation thereto, and in cases where the ordinances of annexed cities, towns or villages granting privileges and rights in the streets, alleys and public grounds for different pur-

poses, contain the provision that the President and Board of Trustees must in each instance grant permission for any specific work under the ordinances, authority is hereby vested in the Commissioner of Public Works to grant such permission in lieu of said President and Board of Trustees."

Under this section the powers granted to the Board of Trustees of the Town of Cicero are conferred upon you, and you should, therefore, pass upon the height of the poles, and if in your opinion, the height mentioned in the application is proper, approve the same.

There is no legal objection to the issuance of said permit, the territory mentioned being now within the City of Chicago.

I return herewith original and duplicate application and tracing showing the location of the poles.

Yours very truly,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 20, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Replying to your favor of January 18, 1905, wherein you request this department to approve an application of the Pennsylvania Company for permit for laying "running tracks" upon right of way west of its main track between the south line of 63d street and 72d street extended, as shown on the accompanying blue print, I beg to say that it appears from the letter of Mr. F. J. Loesch, counsel for said company, which accompanies your letter, that the application is based on an ordinance of the Town of Lake, passed April 5, 1888, and accepted May 1, 1888 (Special Ordinances of Chicago, 1898, page 575).

That ordinance reads in part as follows:

"2. DEFINING THE RIGHT OF WAY. Section 1. The Town of Lake hereby recognizes and grants to the said Chicago,

St. Louis & Pittsburg Railroad Company the right to lay within the limits of its said right of way extending north and south through the west half of Sections six (6), seven (7), eighteen (18), nineteen (19), thirty (30), and thirty-one (31), in said Town of Lake and over and across all streets and alleys now or hereafter opened across the same whatever main tracks, sidetracks, turn-outs and switches said company now or at any time hereafter may desire to construct and maintain upon said right of way, and to operate its engines, and cars thereon subject to such proper police and sanitary regulations as the Town of Lake may in pursuance of lawful authority from time to time prescribe. Provided, that when said railroad company shall wish to construct any track or tracks across any street or streets in pursuance of the authority herein granted, said company shall first notify in writing the Board of Trustees of said Town of Lake of such proposed construction and furnish a plat and statement showing the place and manner in which it is proposed to construct such additional track or tracks, and the same shall be so constructed as not to interfere unnecessarily with public travel.

“And provided, also, that nothing herein contained shall be construed to give said railroad company a right to construct any track or tracks across any of the streets or alleys in said Town of Lake outside of said one hundred feet of right of way, except upon such terms and conditions as the Town of Lake may from time to time prescribe.

“3. VIADUCT—Cost. Sec. 2. This ordinance is adopted upon the express understanding and conditions that said Chicago, St. Louis & Pittsburg Railroad Company shall and will pay to said Town of Lake the reasonable cost of so much of any viaduct or viaducts which said Town of Lake may hereafter wish to construct over the said right of way of said railroad company as is within the boundary lines of said right of way, including therein the cost of such piers or supports as may be necessary to carry such viaduct or viaducts over said right of way.

“4. RIGHT TO OPEN STREETS ACROSS TRACKS. Sec. 3. This ordinance is adopted upon the further express under-

standing and condition that said railroad company shall and will grant to said Town of Lake forever the right to locate across the said right of way of said railroad company such public streets and alleys as said Town of Lake shall hereafter by ordinance duly enacted provide for, without any compensation whatever to be paid to said railroad company. Provided, however, that such streets shall be so located and laid out as not to require the said railroad company to change the grade of any of its tracks which may be constructed upon its said right of way, nor shall they be so located as to pass over or through any station ground or buildings or the yard of said company, said yard not to be more than one mile in length, it being expressly understood that in case said Town of Lake shall deem that the public interests require that such streets or alleys shall be located or laid out across said company's tracks in such a manner as to pass through said station grounds, buildings or yard of said railroad company or in such a manner as to require a change in the grade of said company's tracks, said company does not waive its legal right to damages therefor.

"5. MUTUAL OBLIGATIONS EXTEND TO TOWN OF LAKE AND COMPANY. Sec. 4. The duties and obligations, rights and privileges herein contained shall extend to and be binding upon said Town of Lake, and the municipal corporation or corporations within whose limits said right of way or any portion thereof may hereafter be situated, and upon said Chicago, St. Louis & Pittsburg Railroad Company, its successors, assigns and lessees."

It thus appears that the right of way of the Chicago, St. Louis & Pittsburg Railroad Company, at the time of the passage of said ordinance, was one hundred feet in width, and the right to lay tracks granted by said ordinance was confined to said right of way; whether the tracks which it is now proposed to construct are to be laid within the limits of said one hundred foot right of way is a physical fact which it is for you to determine; if you find that the tracks are to be laid within this right of way, as it existed in 1888, at the time of the passage of said ordinance, and if you further find that the Chicago, St. Louis & Pittsburg Railroad Com-

pany, its successors, assigns and lessees, have at all times complied with the conditions of Sections 3 and 4 of said ordinance in regard to contributing to the cost of any viaduct or viaducts, permitting the opening of streets across the right of way, etc., etc., then there is no legal objection to the issuing of the desired permit by you to the present applicant, which I understand is the successor of the Chicago, St. Louis & Pittsburg Railroad Company.

Your authority is found in Section 1640 of the Revised Code of Chicago of 1897, which reads as follows:

“1640. PERMITS. In all cases where the provision is made by ordinance that the consent of the Commissioner of Public Works shall be obtained to authorize any act to be done, he may grant a permit therefor, subject to the restrictions of the ordinances in relation thereto, and in cases where the ordinances of annexed cities, towns or villages granting privileges and rights in the streets, alleys and public grounds for different purposes, contain the provisions that the President and Board of Trustees must in each instance grant permission for any specific work under the ordinances, authority is hereby vested in the Commissioner of Public Works to grant such permission in lieu of said President and Board of Trustees.”

You will note that the ordinance requires the railroad company to notify in writing the “Board of Trustees of said Town of Lake”, inasmuch as the Town of Lake has been annexed to Chicago since the passage of said ordinance, the application is now properly made to you under Section 1640 above quoted.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

JANUARY 23, 1905.

FRANK I. BENNETT, ESQ., Chairman,

Finance Committee of the City Council

Dear Sir:

In answer to your communication of the 19th inst., in the matter of the widening of Michigan avenue, requesting an opinion:

First. As to whether it will be necessary for the City Council to make an appropriation for the construction of a bridge, in order to meet the objections in the Hutt case in the 132d Illinois Report.

Second. As to the probable amount which it will be necessary to appropriate for the first year's work in the proposed condemnation case.

I beg leave to state as follows:

In my opinion the Court holds, in substance, in the said case of *Hutt v. City of Chicago*, 132 Ill. 352, that where an ordinance for the extension of a street, which is to cross a river, makes no provision for a bridge over the river and orders none to be built, it is improper to assess the property along said proposed street for benefits it may derive from the street with a bridge over the river which may or may not be ordered and built.

Under the *Hutt case*, therefore, in my opinion it would not be necessary to first make an appropriation for the bridge in order to proceed with the improvement, but all that would be required is effective legislation on the part of the city providing for the construction of a bridge. This does not necessarily require the insertion of an item in the annual appropriation bill. Other means of payment might be employed, as for example. an ordinance providing for an issue of bonds for such purpose, or the passage of an ordinance for the making of such improvement by special assessment.

In answer to your second query, I would estimate the amount to be appropriated for the year 1905 at approximately \$25,000. The costs necessitated by the making of the condemnation proceeding for the widening of Randolph street,

from Halsted street to Sangamon street, known as the Hay-market case, approximated \$15,000.

Respectfully submitted,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 23, 1905.

ROBERT McCORMICK, Esq., Chairman "Special Committee on
Boulevard Plans to Widen Michigan Avenue,"
etc., of the City Council.

Dear Sir:

In answer to your communication of the 10th inst., in reference to the widening of Michigan avenue, requesting a "draft of an ordinance to be reported to the Council, comprehending an immediate institution of condemnation proceedings at the smallest possible cost to the city," I beg leave to reply as follows:

Before drafting an ordinance it will be necessary for some definite plan to be determined on so that your committee may request the Board of Local Improvements to take such preliminary steps as are necessary for the passage of the desired ordinance. I, therefore, for the guidance of your committee in determining what scheme shall be recommended to the Board of Local Improvements, submit the following suggestions:

On the 20th inst., I attended a conference at the office of Mr. Henry G. Foreman, Chairman of the joint committee on the widening of Michigan avenue, composed of your committee and representatives from the South Park Commissioners, the Lincoln Park Commissioners and citizens at large, for the purpose of ascertaining the wishes of those who had this matter in charge. I find that it is the desire of your committee to condemn a strip of ground 130 feet, approximately, in width, on the east side of Michigan avenue, commencing at the north line of Randolph street and extending to the main branch of the Chicago River. Also to condemn a strip

of land from the north boundary line of the Chicago River (at a point which would be on a direct line of the extension of the proposed improvement south of the river), extending on a gradual curve to the south line of Illinois street. Then to widen Pine street on the west by condemning a strip of ground approximately sixty feet in width. To continue the widening of Lincoln Park boulevard by condemning a strip of land on the west side, approximately sixty feet in width, to Chicago avenue. Said improvement to be paid for by special assessment.

Further, to provide for the construction of a bridge connecting said proposed improvement across the Chicago River. It being the intention of your committee ultimately, that that portion of the proposed improvement situated on the south side shall be turned over to the jurisdiction of the South Park Commissioners and that portion of the proposed improvement on the north side, shall be turned over to the jurisdiction of the Lincoln Park Board, so as to make a complete circuit of the park system of the City of Chicago.

After this conference, and consultation with real estate experts, the following plans seemed to be settled upon as desirable, providing they are legal:

First. It seems advisable that the improvement be made by the City of Chicago, if possible.

Second. That instead of dividing the improvement into two separate improvements, that is, one improvement condemning property south of the river and another improvement for widening and extending Pine street and Lincoln Park boulevard north of the river, that it would be advisable to make *one* condemnation improvement, the principal difficulty if said scheme is not carried out, being in spreading an assessment treating the same as separate improvements, especially as to that portion south of the river.

Third. That it is desirable that some provision be made for the construction of a bridge connecting the proposed boulevard before the proposed proceedings are commenced, especially in view of the Court's decision in *Hutt v. City of Chicago*, 132 Ill. 352, where, in substance, the Court held that where an ordinance for the extension of a street which is to

cross a river makes no provision for a bridge over the river and orders none to be built, it is improper to assess the property along such proposed street for benefits it may derive from the street with a bridge over the river, which may or may not be ordered and built.

It may be further suggested in this connection that the city may not be at this time in a financial condition to warrant the appropriation of a sum of money sufficient to cover the cost of construction of the proposed bridge.

Further, in the opinion of experts, it seems to be the consensus of opinion that there would be a large public benefit assessed against the City of Chicago. Therefore, it would seem proper and equitable that in estimating the proportion of the cost of the improvement that is to be borne by the city as public benefits, that the city should receive credit for the cost of constructing this bridge.

It therefore would seem advisable to construct the bridge as a part of the proposed improvement, and from the opinion of experts it is probable that the City of Chicago would be assessed at least the cost of the construction of the bridge.

THE PROPOSED PLAN, PROVIDED THE SAME IS LEGAL.

It is proposed, first, that the Finance Committee shall appropriate a sufficient sum of money to meet the necessary expenses during the year 1905, necessitated by the city in carrying on the necessary steps towards the making of the proposed improvements.

Second. That the Board of Local Improvements pass a resolution directing the Engineer of the Board of Local Improvements to prepare an estimate of the cost of condemning a strip of ground 130 feet in width (approximately), commencing at the north line of Randolph street and extending to the Chicago River, for boulevard purposes. The condemnation of a strip of ground 150 feet (approximately) commencing north from the Chicago River and extending to the south line of North Water street for boulevard purposes. The widening of Pine street from the north line of North Water street to the south line of Indiana street by condemning a strip of land which would be approximately 100 feet at the

north end, that is, at North Water street, and fifty odd feet at Indiana street, and the widening of Lincoln Park boulevard by condemning a strip of land approximately sixty-three feet wide, commencing at the north line of Indiana street, extending to the south line of Chicago avenue, approximately sixty odd feet in width, the same to be for boulevard purposes, and the construction of a bridge connecting the proposed boulevard south of the river with the proposed boulevard north of the river, the same to be paid for by special assessment.

Third. That upon the passage of this resolution a competent engineer be at once employed to draw the plans and specifications of the proposed bridge and to submit to the engineer the estimated cost of making the same.

Fourth. Upon this information being furnished the engineer of the Board, the said engineer is to furnish the estimate of the cost of the proposed improvement, exclusive of land taken, to the Board of Local Improvements. Section 7 provides "that said estimate of the cost of the improvement (omitting the land to be acquired) shall be made in writing by the engineer of the Board." . . .

Fifth. That upon this estimate of the probable cost of the proposed improvement (omitting land taken) being furnished the Board, that it pass a resolution fixing a time and place for the public consideration of said improvement.

Sixth. That if, after the public hearing the Board determines that said improvement is advisable, that it at once pass its recommendation and cause to be prepared an ordinance for said improvement, submitting the same to the Council.

Seventh. That said ordinance be passed by the City Council after publishing the same.

Eighth. That upon the passage of the ordinance in accordance with the recommendation of the Board a petition be filed in court praying that an assessment be levied to defray the cost of said improvement.

Ninth. That a report of the Commissioners and an assessment roll be filed, which assessment roll and report of the

Commissioners could be in course of preparation while the preliminary steps were being taken.

Tenth. The statute providing that separate hearings can be had, that the objections of one property owner whose property is assessed (not taken in said improvement) be tried upon a stipulated statement of facts, which statement of facts would cover all the points in controversy. That said cases be tried on legal objections only, and that further controversy on the record be waived as provided by statute and that an appeal be perfected by the losing party to the Supreme Court, so that the legality of the proceeding may be passed upon by the Supreme Court before other objections filed in said cause are tried and before the case is tried on its merits.

Assuming that the steps as above suggested were carried on without unnecessary delay, the legality of the entire proceedings could be passed upon by the Supreme Court either at the next June term of the Supreme Court, or anyway, at the next October term of the Supreme Court, and a decision doubtless rendered at the following term.

POINTS IN REFERENCE TO SAID PROPOSED PLAN.

I.

Can the City of Chicago condemn property for boulevard purposes? The Legislature has bestowed upon the City of Chicago the power:

“To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same.”

Hurd's Rev. Stat., Sec. 7, Par. 62, Art. V., Chap. 24.

Under this clause unquestionably the city possesses the power to condemn private property for boulevard purposes.

This power conferred upon the City Council necessarily implies and includes the power to institute a condemnation proceeding to carry such power into effect.

I. C. R. R. Co. v. City of Chicago, 138 Ill. 458.

C. & N. W. Ry. Co. v. Town of Cicero, 154 Ill. 656.

In 1889, there being some question as to the power of

municipal authorities to authorize and maintain pleasure driveways, the following act was passed:

"Be it enacted by the People of the State of Illinois, represented in General Assembly, that the City Council in cities, the President and the Board of Trustees in villages or the Board of Trustees in corporate towns, whether incorporated under the general law or special charter, shall have the power to designate by ordinance the whole or any part of not to exceed two streets, roads, avenues, boulevards or highways under their jurisdiction as a public driveway to be used for pleasure driving only, and to improve and maintain the same and also to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve and maintain not more than two roads, streets or avenues, and designate the same as pleasure driveways to be used for pleasure driving only, *Provided*, said powers only be exercised when said corporate authorities are petitioned thereto by the owners of more than two-thirds of the frontage of land fronting upon said proposed pleasure driveways."

Art. IX., Chap. 24, Par. 438.

The constitutionality of this act has been passed upon in the case of the *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, where it was held:

"That the limiting of the use of a street to a pleasure driveway under authority of the general act of the Legislature is not a violation by the municipality of the trust upon which it holds such street for the public, as the Legislature has full control of public streets, subject only to the constitutional restriction and the private rights of private owners."

The purpose of the said act of 1889, as stated, was to enlarge the powers of municipalities in respect to the condemning of streets for boulevards or pleasure driveways, but since the act fixes the number of such boulevards at not more than two, and requires a two-thirds majority of the frontage, the effect would be rather a limitation or restriction on the question of the powers of municipalities, therefore, I would recommend that these proceedings should not be instituted under the act of 1889, but that ordinary condemnation proceedings for street purposes be adopted. The necessity or

expediency of exercising the right of eminent domain in the proportion of private property to be used rests with the Legislature or with the corporate body or tribunal on which it has conferred the power to determine the question, and its opinion is conclusive upon the courts.

Chicago v. Wright, 69 Ill. 327.

But the question of whether the specific use, as a public use or purpose, or such a use or purpose as will justify or sustain the compulsory taking of private property is ultimately a jurisdictional one, and the courts cannot absolutely be concluded by the action or opinion of the legislative department. It would then seem to be a question of whether private property can be condemned for this purpose, and if so, is it a proper subject for special assessment?

A further consideration of this point might be properly considered under the heading, "What Is a Local Improvement?"

Before discussing this point I will call your attention to the case of *Thompson v. City of Highland Park*, 187 Ill. 265, which might be considered in point. It was held in this case that if the entire width of the street to be improved is not needed for travel, that the city has the power to provide for the construction, by special assessment, of two paved roadways therein, to be separated except at street intersections by a parkway which shall be covered with loam, seeded with grass and planted with trees.

In the *City of Mt. Carmel v. Shaw*, 155 Ill. 37, the Court held that a city organized under the General Act may do anything with its streets not incompatible with the end for which streets are established.

II.

WILL THE CONSTRUCTION OF THE PROPOSED BRIDGE BE A LOCAL IMPROVEMENT WITHIN THE MEANING OF THE LAW AND A PROPER SUBJECT FOR SPECIAL ASSESSMENT?

In the case of *Louisville & Nashville Railroad Co. et al. v. City of East St. Louis*, 134 Ill. 656, the court, in passing upon what was a local improvement, held in substance, that the statute does not define what shall be considered a local

improvement, that the question is left solely to the determination of the City Councils or Village Boards, their decision as to the utility of an improvement upon the streets and whether it is to be treated as a local improvement for the purpose of raising funds by special assessment to pay for it, is final in the absence of fraud.

In that case the improvement ordinance provided for the construction of a viaduct to be paid for by special assessment. The Court said, speaking by Mr. Justice Wilkin, on pages 661 and 662, as follows:

"Neither is the third objection as a proposition of law well taken. One of the powers conferred upon a City Council in cities, by Section 662, Article 5, Chapter 24 of the Revised Statutes is 'to lay out, establish, open, alter, widen, extend, grade or *otherwise improve streets*, also to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof.' We can discover no good reason for holding that under these powers a viaduct like the one in question may not in a proper case be paid for by special assessment as a local improvement. The statute does not say what shall be considered a local improvement. The determination of that question is left to the City Council or the Village Board, acting within the scope of the power conferred by Section 62, *supra*, the City Council in cities and the President and Board of Trustees in villages are the judges of the utility of an improvement upon the streets and whether such improvement shall be treated as a local improvement in raising funds to pay for it. Their decision on this question is final. (*Fagan et al. v. City of Chicago*, 84 Ill. 227.) Of course they must act reasonably and without fraud, otherwise their action will be void."

At the same term of court that the decision was rendered by Mr. Justice Wilkin in *Louisville & Nashville Railroad Co. v. City of East St. Louis*, *supra*, the court held in an opinion by Mr. Justice Wilkin, that the construction of a bridge over the tracks of the Chicago & Alton Railroad was not a local improvement, but the facts in that case were entirely different from those in the East St. Louis case.

In the *City of Chicago v. Blair*, 149 Ill. 310, the court

held that an ordinance providing for the cost of the sprinkling of a street to be paid for by special assessment was illegal as it was not a local improvement. The court said, speaking by Mr. Justice Shope, pages 314 and 315, as follows:

“A local improvement within the meaning of the statute is a public improvement by reason of its being confined to a locality enhancing the value of adjacent property as distinguished from benefits diffused by it throughout the municipality. The only basis upon which either special assessment or special taxation can be sustained is that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the extent of the burden of the improvement.

Cooley on Taxation, p. 20;
 Dillon on Municipal Corp., 596;
Davis v. Litchfield, *supra*;
Kuehner v. Freeport, 143 Ill. 92;
Chicago v. Larned, 34 Ill. 367;
Chicago v. Baer, 41 Ill. 306;

If, therefore, from an inspection of the ordinance authorizing the making of the improvement it appears from the nature of the work proposed, that the market value of abutting or adjacent property would not be increased thereby, as a matter of law, it would not be a local improvement within the meaning of the statute, and no declaration of corporate authorities makes it so.”

In *Hughes v. City of Momence*, 163 Ill. 535, it was held that constructing a reservoir, sinking a well, erecting a standpipe and pumping works and building for same, were not local improvements, but were general utilities of the inhabitants of the city and must be paid for by general taxation.

In *O'Neill v. People*, 166 Ill. 561, it was held that where an ordinance provides for the construction of a city waterworks, the construction of a standpipe, engine house, etc., were not local improvements, but that an ordinance contemplating the construction merely of a reservoir, fire hydrants and water mains, were local improvements and should be paid for by special assessment.

In *Hughes v. Glos*, 170 Ill. 436, it was held that the construction of a general water works system for fire protection and general use was not a local improvement, but that the city or village had the power to provide for a system of water-works for fire protection for the use of its inhabitants, and that the laying of the water mains for the distribution of water along the particular streets for the use of the residents thereon was a local improvement.

In *Harts v. People*, 171 Ill. 458, it was held that the construction of reservoirs, fire hydrants and water mains was a local improvement which could be paid for by special assessment, but that when an ordinance contemplated the erection of a City Hall, pumping works and stand pipes, these structures were not local improvements.

In *Ewart v. Village of Western Springs*, 180 Ill. 318, the court held, that the power house and generator plant, of an electric lighting system, together with the engine, generator and appliances located at the power house, were not local improvements, but that the poles, electric conductors, lamps and appliances connected therewith were local improvements which could be paid for by special assessment.

In *Shannon v. Village of Hinsdale*, 180 Ill. 202, the court held that the municipal authorities in providing for macadamizing a street may determine whether the removal of an old culvert in such street and the construction of a new one should be regarded as a local improvement.

In the recent case of *Fisher v. City of Chicago*, not yet reported, it was held that the construction of a pumping station used in connection with the sewer system was a local improvement within the meaning of the law.

It would, therefore, seem that in determining whether a proposed improvement is a local improvement within the meaning of the law, it must largely be determined upon the facts in the specific case.

III.

CAN THE IMPROVEMENT BE CONSIDERED A DOUBLE IMPROVEMENT ON ACCOUNT OF PROVIDING FOR THE CONSTRUCTION OF A BRIDGE IN THESE CONDEMNATION PROCEEDINGS?

In *Drexel v. The Town of Lake*, 127 Ill. 54, the court held that where a system of sewerage of the ordinary kind cannot be used to advantage for want of sufficient fall to carry away the contents of the mains and pipes by the force of gravitation, village and other municipal authorities, under a general grant of power, may construct mains, drains and sewers without any limitation or restriction as to the mode in which they shall be built or operated, and will have the right to construct pumping works to be used in the working and use of the sewers.

In *Fisher v. City*, *supra*, the court held, that the construction of a pumping station in connection with the sewer system was a part of the same scheme.

In *City of Springfield v. Green*, 120 Ill. 273, the court held that the paving of several connecting streets was not a double improvement, and in passing upon this point the court said, speaking by Mr. Justice Mulkey, on pages 273 and 274:

“The city authorities in adopting the ordinance must have found as a matter of fact that these streets and parts of streets were so similarly situated with respect to the improvement to be made as to justify treating them as parts of a common enterprise and single improvement, and from the record before us we think they were justified in doing so.”

In *Ligare v. City of Chicago*, 139 Ill. 46, the court held that where two ordinances for the widening of a part of a street are passed on the same day and the last one expressly refers to and is by its terms, dependent upon the adoption and enforcement of the first, and requires that the entire expense of enforcing both, and all of the damages which may be adjudged against the city, shall be paid by certain railway companies in whose interests the ordinances are passed, they will be treated as two parts of a single and entire scheme, the same as if both were embodied in one ordinance.

In *Kerfoot v. City of Chicago*, 195 Ill. 229, it appears that the City of Chicago has passed three ordinances for paving three portions of Archer avenue. The ordinances were passed the same night, and provided for the paving with like material. It also appears that the three improvements were connecting. The objection was made that it should be considered as one improvement. The court in passing upon this objection, speaking by Mr. Justice Cartwright, said, upon pages 231 and 232:

“Even where different streets are to be paved, if they are similarly situated with respect to the improvement and are to be paved with like material and in the same way, the paving of each is a part of one common enterprise and the whole constitutes a single improvement (*City of Springfield v. Green*; 120 Ill. 269). And where two ordinances are passed which are dependent upon each other as providing for parts of a single or entire scheme, they are to be treated as one ordinance and as providing for a single improvement. (*Ligare v. City of Chicago*, 139 Ill. 46.) In this case the entire improvement contemplated was in a single street, of the same material and character throughout, and it cannot be doubted that the ordinances were mutually dependent. They were recommended and passed as parts of the same scheme. It is not probable that the two ends of the improvement would have been provided for with the center section left out, or that if the section next to State street were omitted either of the others would be authorized or constructed. The Board and Council had only one continuous improvement under consideration and it came within the terms of the statute.”

It would seem from a reading of the decisions that in determining what is a double improvement, the question is whether one improvement is dependent upon any other. It will be readily seen that the making of the proposed improvement, that is, the opening of the street in question, is dependent upon some connection across the river, and that the construction of a bridge would be part of the same general scheme.

In this connection the case of *Hutt v. City of Chicago*,

supra, seems in point. The court said, speaking by Mr. Justice Craig:

“The ordinance passed by the City Council is the foundation of this proceeding. Section 1 of the ordinance provides that South Canal street shall be extended from the southerly line of Lumber street to the northerly line of Archer ‘in accordance with the plan hereto annexed.’ By this last clause of the ordinance the plan mentioned must be regarded as a part thereof. Upon an examination of the plan annexed to the ordinance it will be found that the extension of Canal street, from Lumber street to Archer avenue, requires the proposed street to cross a navigable stream,—the Chicago River. From an inspection of the plan and from the language of the ordinance itself, it is apparent that the improvement authorized by the ordinance was one extending to and across the Chicago River, as it would be impossible to extend the street from the one point indicated to the other without crossing the river. It will, however, be observed, that in the ordinance no provision whatever was made for crossing the river, whether the crossing should be by bridge or by boat or by some other means, the ordinance is silent. As has been seen, this proceeding was instituted to assess benefits to land owners along the line of the proposed improvement for the purpose of paying for the land condemned, which was taken for the streets sought to be opened, and the main question presented by the record is whether the theory upon which the case was tried and the benefits were assessed to property owners was correct or incorrect. The commissioners who were appointed to assess benefits to property owners made the assessment on the condition that a bridge would be constructed by the city across the river and all the witnesses called by the city to sustain the assessment predicated their judgments of benefits to property upon the hypothesis that a bridge would be constructed across the river as shown by their evidence.” . . . “It is said, however, in the argument of counsel for the city that the probable and natural consequences of an improvement may be and almost uniformly are taken into consideration in determining the effect of the improvement upon the values of private property. We find no fault with this position. Whatever may be the effect

on the market value of property, if the act ordered to be done is a proper subject for consideration, all natural and probable results to flow from the improvement ordered may properly be considered in estimating benefits, but the trouble here is no bridge has ever been ordered. The improvement ordered is the extension of a street without any provision whatever being made for the erection of a bridge, and if it may be anticipated that at some future time a bridge will be erected by the city and thus benefits flow to property owners, upon the same principle you may anticipate that some other improvement may be made on the line of the street which will also be of benefit to property owners and assess that anticipated benefit against their property. We do not think the future action of the City of Chicago in ordering additional improvements can be regarded either as a probable or natural consequence to flow from the improvement ordered in this case. The extension requires the taking of land and the benefits to be assessed must be confined to the improvement ordered."

IV.

WOULD THE COMBINING OF PROCEEDINGS FOR THE CONSTRUCTION OF A BRIDGE WITH THE PROCEEDINGS FOR THE CONDEMNATION OF LAND FOR STREET PURPOSES BE LEGAL?

If the construction of a bridge and the condemnation of land is all one general scheme, and they are proper subjects of special assessment, then it would seem merely a matter of procedure. So far as I know there has never been commenced a proceeding of this character, that is, combining in one ordinance the condemning of land and the construction of an improvement. It would seem, upon first thought, that they might be considered separate and distinct proceedings, but, in view of the peculiar facts in this particular case, the one improvement being dependent upon the other, it can be argued that it is one general scheme, all of which was proper subject for special assessment, and which should be considered in one ordinance and in one proceeding.

Although there may be some possible doubt as to the procedure, I am confident that a proper method may be devised to carry out successfully this improvement.

It is, therefore, my opinion that before the improvement can be carried into effect there must be some definite and effective legislation towards the construction of the bridge in question; this legislation can be in the following methods:

(1) The providing for the construction of a bridge to be paid for out of the general fund, and an appropriation, for said legislation would not be effective without such appropriation.

(2) Possibly the cost of the bridge could be paid for out of an issue of bonds which may be authorized for the making of public improvements.

(3) By the passing of an ordinance authorizing the construction of said bridge, the same to be paid for by special assessment.

I would further suggest that in the proceedings to be instituted by the City of Chicago, I would eliminate the park feature, that is, I would condemn solely for street purposes, thereby avoiding possible legal difficulties and limitations, such as, frontage consents, etc.

I would further suggest that in the improvement proposed, I would not provide for the condemnation of property beyond Ohio street, as there might be a question as to whether that portion abutting upon Lincoln Park boulevard lies within the jurisdiction of the Lincoln Park Board, in which case the power to widen said boulevard would rest solely within that municipal corporation.

In *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, the court held that two distinct municipal corporations cannot exercise the same powers, jurisdiction and privileges in the same territory at the same time.

If your committee believe it advisable to provide that the cost of the construction of this bridge and the cost of condemning the necessary land be paid for by special assessment, no matter which method of procedure is adopted to carry into effect this scheme, it is impossible to forecast the action of the Supreme Court, if it is called upon to pass upon the legality of such a proceeding; but, a test case could be arranged whereby, doubtless, a decision could be rendered as to the legality of the proceedings at the next October Term

of the Supreme Court, and then the city would be in a position to have the legality of the entire proceedings passed upon, before the case was tried on its merits, that is, as to the question of awards and question of the distribution of the cost of the improvement.

Respectfully submitted,
ROBERT REDFIELD,
Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 26, 1905.

JOHN ERICSON, Esq., City Engineer.

Dear Sir:

We acknowledge receipt of your letter of the 19th inst., regarding the request of Henry R. Worthington to be relieved from the duty of giving a new bond to secure the full performance of the contract between that company and the city for the pumping engines at the Central Park and the Springfield avenue stations.

It seems that this contract requires this company to give a bond until the expiration of the probationary period. It also appears that the reserve still held back by the city on this contract now amounts to about \$46,000. The question is whether the city can or should waive the giving of a bond for the remainder of the period.

As a matter of law, the city can waive this requirement if it sees fit to do so. There is no legal objection to this. It is simply a question of policy. We suggest, however, that if it is decided to waive the bond, and to rely solely upon the reserve for the faithful performance of the contract, it would be better that this be done on recommendation of the City Council.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

JANUARY 25, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have a communication from you of the 23d inst., requesting the opinion of this department as to whether the city can compel the Traction Company to pay a portion of the expense of constructing a bridge across the Chicago River at Archer avenue or any of the cost of maintenance of said bridge after its construction.

The provision granting track rights in this street at the point mentioned, is under an ordinance of May 26, 1884, granting rights to the Chicago City Railway Company to construct, lay down, operate and maintain a double track street railway "commencing on Archer avenue at the present terminus (Halsted street) of the tracks of said company, and running southwesterly along Archer avenue to Western avenue."

The duration of this ordinance was extended by the so-called "blanket extension" ordinance of July 30, 1883, for twenty years, and expired July 30, 1903.

There is no provision by any of the terms of the ordinance for the payment by the company of either the original cost of construction or maintenance of a bridge over the Chicago River or the payment of any portion of such cost.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

JANUARY 26, 1905

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have your letter of the 24th inst., transmitting the application of the Chicago City Railway Company for a permit to install curves, as shown on the blue print attached to said application, from its tracks on Wentworth avenue just

south of 63d street into property of the company fronting on Wentworth avenue.

January 29, 1889, the Board of Trustees of the Town of Lake by ordinance authorized the Chicago City Railway Company:

“To lay down, maintain and operate a double track street railway with all necessary and convenient switches, and with such side tracks as the President and Board of Trustees of said town may hereafter from time to time grant permission to lay on Wentworth avenue . . . from the center line of 63d street to the intersection of said Wentworth avenue with Vincennes avenue. . . .”

Which ordinance was accepted June 25, 1889 (see page 1130, Vol. 2, Special Ordinances).

It will be observed that the privilege was granted only for the laying of a double track street railway, together with the necessary and convenient switches and with such side tracks as might thereafter be authorized by the town authorities. The right to construct “curves” was not granted, and in the absence of authority, you cannot issue a permit for the construction of curves. The company’s representative claims the right to construct these curves under the grant of the right to lay “all necessary and convenient switches”, claiming that a “curve” is a “switch.” We were unable to agree with this contention, and suggested that it would be necessary for the company to obtain a grant of the privilege to construct “curves” from the City Council.

In our opinion, there is a legal objection to the issuance of the permit for want of authority.

I return herewith said application and the blue print.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 25, 1905.

CHARLES ALLING, ESQ., Chairman Committee on State
Legislation of the City Council.

Dear Sir:

I have the honor to submit herewith a draft of a bill to amend the general Cities and Villages Act. I have endeavored to incorporate in this bill the results of all the proposed amendments to said act which have been concurred in at the various meetings of your honorable committee. Part one of this draft of the bill contains provisions for the adoption thereof by popular vote, and clearly states that the present Cities and Villages Act shall continue to apply to Chicago except so far as the provisions of said act are inconsistent with the provisions of this amendment.

Briefly stated, the new provisions are as follows:

First. That the term of office of the Mayor shall be four years;

Second. That he may appoint a Board of Pardons to advise him in the exercise of his pardoning power;

Third. That the compensation of all officers shall be by salary fixed by the City Council, and that all fees and earnings of his office or department shall be paid into the city treasury;

Fourth. That neither the treasurer nor any officer having the custody of public funds shall be entitled to the interest accruing thereon;

Fifth. That the comptroller shall advertise for bids for interest upon the city's money and that the City Council may make an award upon such bids, and designate the banks which shall act as depositaries of the city's funds; that such depositaries shall give bond and that all money so deposited with such depositaries shall operate to reduce the amount for which the treasurer shall be responsible and for which he shall give an official bond;

Sixth. That the City Council shall fix the amount of all bonds and may change the amounts from time to time and require new bonds on penalty of forfeiture of office; but that any person aggrieved by any order of the City Council in

this respect shall have the right to a hearing before the Civil Service Commission upon the question so involved;

Seventh. For the consolidation of the departments of the City Attorney and Corporation Counsel;

Eighth. That no member of the City Council shall hold any other civil office under the Federal, State or city government, except in the National Guard, or as a Master in Chancery or Notary Public;

Ninth. That if ordinances of the City Council be vetoed by the Mayor, he may submit with his veto message a substitute ordinance;

Tenth. That if an ordinance be vetoed and fail to pass over the Mayor's veto, the same ordinance may not be again re-introduced at the same meeting of the City Council;

Eleventh. That upon consolidation of existing taxing bodies and the assumption by the city of the debts of two or more of such consolidated bodies, the City of Chicago may become indebted not to exceed five (5) per cent. of the full value of the taxable property within its limits, but that no new bonded indebtedness, other than for refunding purposes, shall be incurred without a referendum vote;

Twelfth. That the City Council may manufacture and sell gas and electricity, and regulate the rates at which the same are sold by private persons or corporations. Such action of the city in regulating such rates to be reviewed and determined by the Circuit Court;

Thirteenth. That the City Council may also compel the extension of pipes and wires and service for the furnishing of gas or electricity;

Fourteenth. The regulation of the use of space under and over streets, alleys and public places, and upon the payment of compensation the permission of the use of space underneath the sidewalks and more than twelve feet above the level thereof;

Fifteenth. The acquirement, maintenance and regulation of municipal parks, play grounds, public beaches and bathing places;

Sixteenth. The exercise of the right of eminent domain for municipal purposes;

Seventeenth. The declaring, defining and abatement of nuisances and the regulation of the locations and conduct of hospitals and infirmaries;

Eighteenth. The taxation of trades, occupations, interests, business and professions.

Almost immediately upon the beginning of the task of framing this bill, it occurred to me that all possibility of the arising of technical, legal questions as to the constitutionality of the recent amendment to the constitution might be eliminated in regard to this part of the proposed new legislation for Chicago by following the course adopted by the legislature in 1872 when it passed the general Cities and Villages Act of that year, that is to say; by framing this amendment as a general act to take effect by any municipal corporation upon its adoption by popular vote. Since that time I have observed a similar suggestion made by Prof. Henry Schofield, of the Law Department of the Northwestern University, formerly an Assistant Corporation Counsel of the City of Chicago. Taking into careful consideration the suggestions made by Prof. Schofield, and having examined carefully the decisions of the Supreme Court in the litigation which arose after the adoption of the said act of 1872, I have concluded it advisable to submit for your consideration the question of following such course. For this purpose it will only be necessary to strike out of line 1, Section 1, of Article XII, the words "the City of Chicago," and insert in lieu thereof the words "any city now existing in this State;" and in the body of the act to strike out the words "the City of Chicago," and insert in lieu thereof the words "such city." The act thus drawn if enacted into a law by the legislature, will not affect any other city than Chicago, unless it is availed of by such other incorporated city upon compliance with the provisions of the act in regard to the submission of the question to popular vote.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 26, 1905.

D. V. HARKIN, ESQ., Chairman,

Committee on Building Department of the City Council.

Dear Sir:

You lately submitted to me an ordinance which has been referred to your committee governing the location of dance halls, and in the letter of transmission you state that the intention of the ordinance is to prohibit the location of what are considered objectionable dance halls and not to prohibit dances conducted in a respectable manner by social clubs and similar organizations. You also state that the committee considers the ordinance submitted too broad in its terms, and requests that this department re-draft the same along the lines suggested.

In reply I beg leave to advise you that the city, while it has the power under the charter provisions to regulate dance halls, its regulation in that respect must be general and uniform and apply to all public dance halls, and, therefore compliance cannot be had with the suggestion made by you that the ordinance be redrafted so as to apply only to so-called "objectionable dance halls".

The ordinance introduced by Alderman Young and submitted to this department by you, provides that it shall be unlawful for any person, firm, association or corporation to build, construct, maintain, conduct or manage any public dance hall in any block in which two-thirds of the buildings on both sides of the street or streets on which the proposed public dance hall may front, are used exclusively for residence purposes without the written consent of a majority of the property owners according to frontage on both sides of the streets bounding said block.

In my opinion, the City Council has the power to pass an ordinance of this kind, but the same would apply to all public dance halls. The ordinance submitted by Alderman Young is in proper form and would have this effect.

I have conferred with Alderman Young on this matter and he informs me that his object was to reach undesirable dance halls—that is, halls which are improperly conducted to the annoyance of the residents in the vicinity of the same. I

explained to him that the city could not legislate other than by general ordinance.

I return herewith the ordinance transmitted by you.

Very truly yours,

WM. H. SEXTON,

First Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 26, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your letter of recent date, in which you call attention to the evils which arise from the granting of temporary permits to auctioneers, and requesting me to prepare for you an amendment intended to cure such evils by requiring all auctioneers in the first instance to take out a license for an entire year, I beg leave to say:

I am of the opinion that under the present ordinances you are not compelled to grant special daily permits to any other auctioneers than those who have already taken out an annual license and paid the license fee of \$300.

The adoption of a different practice has undoubtedly arisen from the fact that the chapter of the code on auctions and auctioneers has been so often amended that it is difficult to ascertain what its provisions now are. As now in force, the fourth section of said chapter establishes a penalty of \$50 for any person selling at public auction without having obtained a license therefor "as above required", and said words last quoted refer to the first section of said chapter, which requires the payment of an annual license fee of \$300. I am of the opinion that this license fee of \$300 is not divisible, and cannot be issued for fractional parts of the year, but must be paid in full before a license can issue. (*Handy v. People of the State of Illinois*, 29 Ill. App. 99.)

The provision for a permit to be issued on the payment of \$10 per day is an amendment passed January 20, 1902, which reads as follows:

“No auctioneer shall sell, or offer for sale, at any public auction, any goods, wares, merchandise or other personal property, in any place, house, store or building other than in the place, house, store or building where he is authorized to sell by license, without a special permit from the Mayor; provided, however, that no permit shall be granted without the persons asking or desiring such permit first paying therefor to the City Collector ten dollars for each day such sale shall occupy.”

Clearly no such special permit should be granted to any person other than a licensed auctioneer. It is not a permit to engage in the business generally, but a permit entitling a licensed auctioneer to temporarily do business at a place other than that named in his annual license.

In the revision of this chapter for the new city code I have given special attention to the matter, and the subject has been cleared up so that there can be no doubt that under the new code the evils which you refer to cannot exist if the provisions of the ordinance are enforced.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 27, 1905.

MR. L. E. GOSSELIN, Auditor and Deputy Collector.

Dear Sir:

I have your favor of the 23d inst., in which you ask the opinion of this department upon the following subject:

“Does the act of May 16, 1903, for the creation and disbursement of a police pension fund under a clause directing that three per cent. of licenses other than those mentioned be paid to the police pension fund, provided the sum so paid from this source shall not exceed twenty-five thousand dollars per annum, contemplate the payment to the police pension fund of three per cent. received from street car companies for what are known as ‘licenses’ issued to them for the operation of their cars?”

The twelfth clause of Section 1 of the act in question provides:

“Three per cent. of all revenue collected or received by any such city, village or incorporated town from all licenses issued by such city, village or incorporated town not mentioned in this bill: *Provided, however,* that the sum so received from such three per cent. shall in no case exceed the sum of twenty-five thousand dollars per annum.”

March 18, 1878, the City of Chicago, under its power “to license hackmen, draymen, omnibus drivers, cabmen, expressmen and all others pursuing like occupations,” passed an ordinance requiring “every person, firm or corporation engaged in the occupation of operating and running street cars” to apply for a license and pay into the treasury of the city the sum of fifty dollars for each car, and fixing a penalty for failure to take out such license, and requiring the license to be conspicuously posted in the car.

This was a penal ordinance, enacted in the exercise of the delegated legislative power of the city. There was no provision that the ordinance should be accepted by any of the street railway corporations, but it was provided that it should go into effect from and after its passage. As to the companies, it was coercive legislation, which partook in no degree of the character of a contract.

The right of the city to pass this ordinance was litigated in the Federal Court, and was sustained by Judge Drummond in the case of *Allerton v. City of Chicago*, 9 Bissel, page 552. An appeal was prayed from this litigation, but before the case came on to be heard in the Supreme Court of the United States a contract was entered into between the railway companies then operating in the City of Chicago and the city, in which an extension of twenty years was given to those companies without prejudice to the existing controversies regarding their rights under the so-called “ninety-nine year act” of 1865. This contract was embodied in the form of an ordinance, and, among other things, it made a settlement of the existing controversies with regard to the payment of license fees by the companies, and it was provided therein that a license fee of twenty-five dollars per car should be paid for the claims which had accrued prior to the date of the settlement, and that thereafter fifty dollars per car

should be paid. This contract was embodied in the form of an ordinance passed July 30, 1883 (amended August 6, 1883), but it did not purport to exercise the right of the city to license street car companies generally. It was not even in form a general ordinance applying to all street car companies. It was limited to the three then existing companies and was in every sense of the word a mere contract. The ordinance specifically repealed all prior ordinances requiring the payment of license fees.

In these circumstances, I am of the opinion that the money collected from said companies under said ordinance of July 30, 1883, is mere compensation for the privilege of operating cars; that the ordinance is a contract, and that the money thus received is not received by virtue of the undoubted power which the city then possessed and still possesses to pass an ordinance requiring the payment of license fees from street railway companies. I therefore conclude that the moneys referred to in your communication as "street car licenses" are not embraced by the terms of the act of May 16, 1903, and should not be credited to the police pension fund.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

JANUARY 27, 1905.

HONORE PALMER, Esq., Chairman Commission on High Pressure Water Systems of the City of Chicago.

Dear Sir:

I have the request of your commission for an opinion on the legality of using the water fund to construct High Pressure Water Systems in the City of Chicago.

July 20, 1903, the City Council adopted an ordinance instituting High Pressure Water Systems for fire protection only. (See page 994, Council proceedings, 1903-4.)

Section 1 of the ordinance provides that the compact portions of the city devoted to trade and manufactures shall be divided in districts, termed High Pressure Districts.

Section 2 provides that in High Pressure Districts the

water used for fire protection shall be delivered at high pressure by mains and pumps separate from those furnishing water for other purposes.

Section 3 establishes an advisory commission, which shall be known as the Commission on High Pressure Water Systems and which shall act during two years, and take charge of the institution of the systems.

Section 4 provides that the commission shall comprise six representatives of business organizations and interests, and seven aldermen, who shall be appointed by the Mayor; also a hydraulic engineer, who shall be appointed by the Mayor, and said section also provides that the Fire Marshal and Commissioner of Public Works shall be *ex officio* members of the commission.

Section 5 provides that the members shall serve without salary, but that the hydraulic engineer shall be paid not more than five hundred dollars per month.

Section 6 provides that the commission shall define the limits of the High Pressure Districts, and determine in what order construction shall proceed; that it shall make plans and specifications of the systems; make an examination of past fire losses to ascertain where mains are most needed; report to the City Council such modifications of the building ordinance as may be desirable in High Pressure Districts; consult with heads of departments and recommend to the City Council such provisions as may be necessary to secure proper operation of High Pressure Systems, and maintenance of proper records by the city; notify property owners and tenants in the proposed districts of the intent to install High Pressure Systems, and solicit signatures for contracts for High Pressure service.

Section 7 fixes the qualifications of the hydraulic engineer, and provides that he shall act under the direction of the commission, etc.

Section 8 provides that the commission shall first consider plans for the district bounded by 12th street, Halsted street, Chicago avenue, and Lake Michigan; that general plans shall be made for this entire territory, with the intent

of installing systems by degrees, beginning where there is most need.

Section 9 provides that plans for other districts shall be considered upon petition of 50 per cent. of the property owners concerned, and an affirmative action by the City Council.

Section 10 is as follows:

"SECTION 10. CONSTRUCTION OF SYSTEMS.—It is hereby made the duty of the Water Department to construct High Pressure Water Systems for fire protection, and the former methods of furnishing water for fire protection are declared to be inadequate and shall be continued only in residence portions of the city and temporarily in other portions until building improvements shall become sufficiently developed to warrant installation of High Pressure Systems. The plans approved by the Commission on High Pressure Water Systems, during the two years in which the commission shall hold office, shall be constructed by the Department of Public Works, under the supervision of the Hydraulic Engineer."

Section 11 is:

"SECTION 11. The commission shall make provision for use of High Pressure Water by property owners for purposes of fire protection. The commission shall guard the interests of the city in planning such connections and shall proceed so as to incur no liability on the part of the city by reason of such connections. The commission shall submit for the consideration of the City Council regulations to be observed by the property owners in making connections, penalties to be imposed for improper use of High Pressure Water and charges appropriate for different classes of property to cover cost of connection and annual service. No service shall be furnished except upon compliance with regulations established by the City Council."

Section 12 provides for the charges for the service to the property owner.

Sections 13 and 14 provide for the expenses of the commission.

It will be observed that the purpose and object to be attained by the institution of the High Pressure Water Sys-

tem is better fire protection in those districts of the city which, because of the character of the buildings and enterprises conducted therein, require the installation of such system for sufficient and adequate fire protection.

Section 1, Article 10, of the Cities and Villages Act of 1872 confers power upon the City Council to provide for a supply of water. Section 3 thereof gives the City Council power to make all needful rules and regulations concerning the use of water supplied by the water works of the city, and to do all acts and make such rules and regulations for the construction, completion, management or control of the water works, and for the levy and collection of water rates, as the City Council may deem necessary and expedient. It also gives power to levy a general tax for the construction and maintenance of such water works. (P. 304, Hurd's Revised Statutes, 1903.)

By this statute municipal corporations are authorized to provide for a supply of water for fire protection and for the use of their inhabitants, by the erection, construction and maintenance of water works.

In my opinion no possible exception can be taken to using a portion of the money in the water fund to construct such High Pressure Water Systems, as such systems are within the purposes for which the water works system of the municipality was organized, and the power of the City Council creating and providing for the construction of such system cannot, in my opinion, be questioned, as authority so to do is conferred by the General Cities and Villages Act.

It appears from an examination of the ordinance creating the commission and conferring powers and duties upon it, that it contemplates that the owners of property protected by the maintenance of the High Pressure System shall pay the charges fixed by the City Council for the cost of connection of their premises with the mains in the streets and for annual service, which charge for annual service "shall be based upon the value of the service to the individual in relieving him of expense to which he would otherwise be put in completing the fire protection of his property." The systems will be self-sustaining and the revenue derived will be

paid into the water fund. Property will be better protected from damage and destruction by fire, and the usefulness of the water department greatly enlarged, thus resulting in advantage to the property owner and contributor to the water fund and also to the value of the water department as a great asset of the municipality.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

JANUARY 28, 1905.

MR. THOMAS M. HUNTER, Alderman, 35th Ward, Chicago.

Dear Sir:

We have your letter regarding the proposal to open a subway under the Chicago & Northwestern Railway tracks at 47th avenue if those tracks are elevated west of 46th avenue, in which you say:

“It has been suggested that the only way in which a subway can be had at said 47th avenue and Kinzie street, is by causing the Chicago & Western Indiana, or the Belt Railroad, so-called, to elevate three feet more than they have done. This I presume in turn would necessitate the Lake Street Elevated elevating their tracks three feet more. What I desire to know is, can we force the railroad companies before mentioned to elevate so that when the Chicago & Northwestern start their work, a subway can be had at 47th avenue?”

By the ordinances of the Town of Cicero, the Chicago & Western Indiana Ry. Co. is authorized to construct and operate railroad tracks in 46th avenue and across all intersecting streets, among which are Kinzie and Lake.

By the Town of Cicero ordinance of August 25, 1883, this company was required to elevate its tracks so that there would be a clear headroom of nineteen feet where they cross the Northwestern tracks in Kinzie street, and it is also provided by this ordinance that these tracks shall be elevated over other streets on a viaduct, and that “the elevation of

the viaduct over said streets shall be based upon the present grade of said streets, it being understood that such viaduct or viaducts as herein provided shall not be disturbed after once established to suit any possible shifting of the grades of any such streets."

This same language is also found in the Town of Cicero ordinance of September 26, 1885, which makes some changes in the other provisions of the ordinance of August 25, 1883, but does not change the headroom over the Northwestern tracks.

Notwithstanding this language, the city has the power to now compel the Western Indiana Company to raise its tracks still higher in order that the Northwestern tracks may be so elevated that a suitable and convenient subway can be constructed at 47th avenue, for it was not within the power of the Town of Cicero to thus relinquish its right to control its streets, or to evade its duty to make and keep its streets convenient and safe for use by the general public. (*C., B. & Q. R. R. v. Quincy*, 136 Ill. 563, 571.)

As the power of the city (or the Town of Cicero) to improve its streets is a continuing power, the authority granted to the Western Indiana Company must yield to the city's duty to adjust and grade its streets so as to best promote the general public welfare. (*C., B. & Q. R. R. v. Quincy*, 139 Ill. 355, 361.)

We believe we are safe in assuming that the Western Indiana Company will fight every effort to compel it to further elevate its tracks, and that it will be aided in this fight by the Chicago & Oak Park Elevated R. R. Co., which will be compelled, by the proposed action, to raise its tracks.

This expected resistance will lead to litigation that may be prolonged, but that is a matter for the City Council to consider.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON.

First Assistant Corporation Counsel.

FEBRUARY 1, 1905.

FRANK I. BENNETT, ESQ., Chairman,

Finance Committee of the City Council.

Dear Sir:

I acknowledge receipt of Secretary White's inquiry of January 31 (Finance Committee number 3709), as to whether or not it is the duty of the city to remove sunken vessels in the Chicago River; and also whether or not the former owner of a sunken or abandoned boat is liable for the expense of its removal.

The Chicago River is a navigable stream, and it is not under the absolute control of the City of Chicago. Under the Federal Constitution, Congress is clothed with power to regulate commerce, but until such time as Congress sees fit to enact legislation on the subject, the City of Chicago, under the grant of legislative power, has the right to make reasonable regulations concerning obstructions in the river. However, by an act passed March 3, 1899, Congress has assumed jurisdiction over the subject, and thus superseded State or city authority.

Section 15 of the act provides in part as follows:

"Whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, . . . it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

Section 16 defines the penalty; Section 17, the duties and powers of various Federal officers in apprehending offenders; Section 19, the preliminary steps to be taken to remove the obstruction.

Section 20 provides for the expense of such removal and the reimbursement of the government therefor, and is in part as follows:

"That under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, . . . in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion

of the Secretary of War, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of War or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: PROVIDED, that the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it; AND PROVIDED FURTHER, that the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo, and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in the removal, and the proceeds of such sale shall be covered into the treasury of the United States. . . .”

From the foregoing, I am of the opinion that it is not the duty of the city to remove such vessels from the Chicago River, but it is made the duty of the Federal authorities to do so.

Lussem vs. Sanitary District, 192 Ill. 425;

City of Chicago vs. Law et al., 144 Ill. 579.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON.

First Assistant Corporation Counsel.

FEBRUARY 3, 1905.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Replying to your letter of the 28th ult., will say that inasmuch as F. Gielow and William Sullivan were certified by

the Civil Service Commissioners and appointed to their respective offices after an examination and under apparent authority of law; and as they have entered upon the discharge of the duties of said offices and are still so publicly employed, I am of the opinion that they are, at least, officers *de facto*.

That payment to a *de facto* officer is a defense to an action by the *de jure* officer to recover the same salary, is, I believe, firmly established.

Parker v. Sup'rs., 4 Minn. 59;

State v. Milne, 36 Neb. 301;

Terhune v. City of N. Y., 88 N. Y. 247;

Shaw v. Pima Co., 18 Pac. 273;

Saline Co. Comrs. v. Anderson, 20 Kan. 298;

State ex rel. v. Clark, 52 Mo. 508;

Dolan v. City of N. Y., 68 N. Y. 274;

Demarest v. City of New York, 147 N. Y. 203;

Stone v. Wetmore, 42 Ga. 601;

Higgins v. City of N. Y., 131 N. Y. 128;

Gorman v. Co. Comrs., 1 Idaho 655;

County of Luzerne v. Trimmer, 95 Pa. 97;

Leach v. Cassidy, 23 Ind. 449.

This is true even if notice of the claim of the *de jure* officer and the insolvency of the *de factor* officer has been given.

State of Nebraska ex rel. v. Milne, supra;

Saline Co. Comrs. v. Anderson, supra.

"Public policy will prevent the courts from interfering to disturb a *de facto* officer in the receipt of the fees."

Burgess v. Davis et al., 138 Ill. 578, p. 582.

"This principle was . . . rested upon the ground of public policy, which requires that fiscal officers, charged with the payment of salaries, should be deemed justified in paying them to the persons clothed with the apparent title to an office, without inquiring whether others have the better right. The remedy, it was said, of the person wrongfully deprived of the office is to recover his damages for the wrong against the usurper."

I am, therefore, of the opinion that no claimant who might afterwards establish the fact that he was an officer *de*

jure, could compel the city or its fiscal officers to pay him any salary paid to a *de facto* officer, so long as the right to the office was undetermined. His remedy would be against the *de facto* officer (*Mayfield v. Moor*, 53 Ill. 428).

Respectfully,

CECIL PAGE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON.

First Assistant Corporation Counsel.

FEBRUARY 4, 1905.

TO THE HONORABLE, THE FINANCE COMMITTEE, OF THE CITY COUNCIL.

Gentlemen:

In answer to your communication of the 18th inst., addressed to Corporation Counsel Tolman, in reference to the collection of the unpaid special assessments against the West Park Board, in which communication you request an opinion as to whether the city can collect these assessments, I beg leave to state, as follows:

In the case of *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, it was held that park property, under the control of the West Chicago Park Commissioners, was not subject to special assessments levied by the City of Chicago. In their opinion the court said, on page 395:

“That the case was brought as a test case for the purpose of settling the question of the power of the City of Chicago to assess the lands of the parks and boulevards under the control of the appellants (West Chicago Park Commissioners) for the improvement of streets adjacent thereto or abutting thereon.”

The court held that the Park Board in the purview of its powers is a corporation endowed with the same corporate functions, derived from the same source and exercised in substantially the same way as the City of Chicago; that its power, so far as relates to the laying out, improvement, management and control of the parks, is plenary, and independent of the City of Chicago; and that the jurisdiction to levy special

assessments on such park property is in the Park Commissioners, and not in the City of Chicago.

The court, however, did not hold that park property is exempt from assessment by the proper municipal authority, but only that the City of Chicago did not have the authority to make such assessment.

It follows from this decision, therefore, that the answer to your inquiry is that all park property under the control of a Board of Park Commissioners vested with powers by the legislature similar to those of the West Park Commissioners could not be assessed for local improvements by the City of Chicago.

And it necessarily follows that the City of Chicago has no power to proceed against the West Park Commissioners, either by mandamus or any other action, to collect a special assessment levied against such park property.

Respectfully submitted,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 6, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

You have referred to this department for an opinion, a letter from Mr. Arthur Burrage Farwell, Secretary of the Hyde Park Protective Association, addressed to you, and the same has been referred to me for attention. The letter reads as follows:

"I understand that Murphy Bros. who have kept a saloon at southwest corner Lake avenue and 55th street, are going out of business and that a new petition is being circulated for other parties to operate a saloon at same place. We desire to call your attention to the fact that on the east side of Lake avenue for about two-thirds the distance from 55th street to 56th street the property is owned by the Illinois Central R. R. Co. We ask that in computing frontage nec-

essary for a legal petition, this property of the I. C. R. R. Co. should be counted—and that any legal questions regarding it, shall be referred to your Corporation Counsel and this Association be given an opportunity to be heard. Would also call to your attention that about 1892 the property of the I. C. R. R. Co. on 56th street was signed *for* a saloon (I think for one of the hotels near Cornell avenue) and without that property being counted a license could not have been obtained.”

The ordinance of the Town of Hyde Park, passed April 4, 1889 (Revised Code of Chicago of 1897, Section 2085), reads in part as follows:

“Any person who shall desire to obtain a license to keep a saloon or dram shop shall, in addition to the requirements now provided by ordinance, present his application in writing to the Village Comptroller for such license, in which shall be stated the name of the person or firm to whom the license is to be issued and the place where such saloon or dram shop is to be kept, which application shall be signed by a majority of the property owners, according to frontage on both sides of the street in the block upon which such dram shop is to be kept, and shall also be signed by a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which such dram shop shall have its main entrance.”

It will be observed that the ordinance requires the signatures of “a majority of the *property owners* according to frontage.” It will also be observed that the specific question presented in Mr. Farwell’s communication is, not whether the Illinois Central Railroad Company has the right to sign a petition for a saloon license, but whether the frontage owned by said company should be counted in computing the total frontage in the block in which the proposed saloon is to be located, in order to determine the amount of frontage consents necessary to entitle petitioner to a license. This question, it seems to me, must be answered in the affirmative. The frontage certainly is owned by *some one*, and must be counted in computing the total frontage in the block. Whether the railroad company in question has the right to sign for it is an

entirely different question which it is not necessary now to determine.

The question here involved has been conclusively answered by the Supreme Court of this State in the recent case of *Joseph Theurer v. The People ex rel. Deneen*, reported in 211 Ill., at page 296, commonly known as the "Edelweiss" case. In that case it was contended that the South Park Commissioners are not "property owners" within the meaning of the ordinance hereinbefore quoted; that they have no right to sign petitions for the park frontage; and that, consequently, the park frontage should not be counted in computing the total frontage of the block in which the dram shop was located. This contention was disposed of by the court (p. 298), as follows:

"If the contention of appellant that said commissioners have no power to sign for said property be conceded to be sound, we do not think it follows that the park frontage should not be considered in determining the amount of frontage for which signatures must be obtained. If a portion of the frontage belonged to a minor or a lunatic, such owner would have no legal right to sign the application for a dram shop license by reason of his minority or mental incapacity, but because of his nonage or insanity his frontage could not lawfully be eliminated from the total amount of frontage upon the four streets surrounding the block in which the dram shop was to be kept, but would be required to be considered. So, here, the park frontage must be taken into consideration in determining the amount of frontage for which the signatures of owners must be obtained."

And again, the court says:

"It is clear, we think, that all the frontage on both sides of the street in the block must be counted in determining the amount of frontage for which signatures must be obtained."

No reason is perceived why property owned by railroad companies should be regarded as being, in this respect, on a different footing from that owned by other corporations or individuals, or property controlled by Park Boards.

Moreover, the decision hereinbefore cited seems to me to be conclusive on this question.

If, therefore, the Illinois Central Railroad Company owns property fronting on Lake avenue, between 55th and 56th streets, then such property should be counted in determining the frontage consents necessary to entitle an applicant to a license to conduct a saloon at the locality mentioned.

Respectfully yours,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON.

First Assistant Corporation Counsel.

FEBRUARY 6, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I am in receipt of a verbal request from you for an opinion of this department as to whether the license formerly issued to Jacob Sachs, license No. 18, to follow the vocation of auctioneer at No. 146 South Clark street, can be assigned for the remainder of the license period to Samuel Bernstein to practice said vocation at No. 173 South Clark street.

Under that clause of the Cities and Villages Act giving the city power to "tax, license and regulate auctioneers," etc., an ordinance was passed (Ch. 7, Revised Code of 1897), Section 123 of which provides:

"123. LICENSE—FEE—BOND. Any person may become an auctioneer and be licensed to sell real and personal property at public auction, at a place named in said license, upon paying to the City Collector the sum of three hundred dollars, and executing a bond to the city, with two sureties, to be approved by the Mayor, in the penal sum of one thousand dollars conditioned for the due observance of the ordinances of the city."

Section 124 provides:

"124. APPLICATION—CONTENTS. Every person who may wish to obtain a license, as above mentioned, shall apply in writing for the same to the Mayor, setting forth therein his proposed place of business and the names of his sureties, and in no case shall such license be transferable, or the place of

business changed, without the consent, in writing, of the Mayor."

As has been held by this department in relation to saloon licenses, a license is a personal privilege, which ordinarily cannot be transferred by the licensee.

Section 124 above quoted implies that with the consent of the Mayor the license may be transferred or the place of business changed. In my opinion, however, this cannot be done. If a person under permission granted by Section 124 could transfer his license merely upon the consent of the chief executive, the bond provision would become wholly inoperative, as the bond given by the original applicant would of course lapse, so far as the liability of the sureties went, upon a change in the obligation. There is no provision in Section 124, or elsewhere in the chapter, for a new bond to be given by the transferee, and hence if this section were followed the transferee could do business in plain evasion of the fundamental requirement of the ordinance.

The payment in advance of the license fee is a surrender on applicant's part of all claim to the fee, and the city is entitled to hold the same, and another person cannot come in and take advantage of the payment by the original applicant and continue the business for the unused portion of the term without a further payment.

It also appears from the correspondence attached to the application that the original license of Jacob Sachs was revoked November 30, 1904, and has never been restored. If this be true, there is at present no outstanding license to transfer, as the original license issued by you has been revoked and the authority to pursue an avocation thereunder has ceased.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 9, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

We have your communication of the 2d inst., transmitting a communication from the secretary of the Hyde Park Protective Association, and also an opinion of Church, McMurdy & Sherman, in reference to the granting of special permits in the prohibition or local option districts of Hyde Park.

The question submitted is whether or not the City of Chicago has authority to allow the sale of intoxicating liquor in "any theater, hall or other building in which public entertainments are held for gain . . . or in any room or rooms connected with the same," as provided by Section 116 of the Revised Code of Chicago, 1897, in Hyde Park.

Said Section 116 is:

"It shall not be lawful for any person or persons to sell or give away any spirituous, vinous, malt or other intoxicating liquors in any theater, hall or other building in which public entertainments are given for gain or in any room or rooms connected with the same, without a special permit from the Mayor, under a penalty of not more than one hundred dollars for each and every violation of this section."

At the time of the annexation of the Village of Hyde Park to the City of Chicago, certain ordinances were in force in that municipality regulating the liquor traffic. All ordinances in that municipality in force at the time of the annexation are by virtue of the provisions of Section 18 of the Annexation Act, still in full force and effect. All ordinances of the Village of Hyde Park at that time and now in force in regard to the regulation of liquor traffic, use the statutory term "dram shop" and therefore regulate every place where spirituous, vinous or malt liquors are retailed in less quantities than one gallon. Some of the ordinances in force in that territory, formerly the Village of Hyde Park, absolutely prohibit the maintenance of any dram shop or saloon, and others restrict the privilege of maintaining a dram shop or saloon to persons who shall, in addition to obtaining a license so to do, obtain the consent of the property owners within a certain

prescribed distance from the location of such dram shop or saloon.

In our opinion, any place where spirituous or vinous or malt liquors are retailed in less quantities than one gallon, is a dram shop, and, therefore, subject to the ordinance in force in the Village of Hyde Park at the time of its annexation to the city. It will, therefore, be necessary to require an applicant for a special permit or license, as authorized by Section 116 of the Revised Code of Chicago of 1897, to fully comply with the provisions of said ordinances. Each application for such special permit or license involves in the first instance the ascertainment of whether or not the location of the theater, hall or other building in which public entertainments are given for gain and in which it is proposed to sell liquor, is within any of the districts affected by the local option or prohibition ordinances passed prior to the annexation of such district to the city.

The ordinances applicable to such local option or prohibition district must next be interpreted, for in different districts they are by no means alike. Those applicable to Hyde Park clearly apply to all "dram shops", while certain of those in the Town of Lake do not apply to anything but saloons, as you will observe by a copy of our opinion of even date, addressed to the secretary of the Englewood Law and Order League.

We herewith return the letters you transmitted.

Respectfully submitted,

WM. H. SEXTON,

Assistant Corporation Counsel.

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 9, 1905.

GEORGE G. PENDELL, Secretary Englewood Law and Order League, 335 West Sixty-third Street, Chicago.

Dear Sir:

We have your letter of January 26, 1905, stating that the Town of Lake was made a part of the City of Chicago, together with certain local ordinances retained and made permanent by the annexation act; that under these ordinances an applicant for a license to sell liquor must make a signed application in writing, stating the time for which such license is desired, not less than three months nor more than one year, and accompanied by a petition of the majority of the legal voters residing within one-eighth of a mile from the place where such saloon (or "tippling house") is to be kept, and you therein state that the point upon which you desire an opinion from this department is the following:

"Is it obligatory upon promoters of dances and other entertainments in dance halls, so called, in the Town of Lake, to comply with these local ordinances before obtaining special bar permits or license to sell intoxicating liquor at such entertainments under Section 116 of the City Ordinances."

Section 18, Chapter 57, of the Revised Ordinances of the Town of Lake, so far as material to be quoted:

"No license shall be granted to keep a saloon within one hundred and fifty feet of any public park, parkway, boulevard, public school or church; nor in all of that part of the west half of Section 5, Township 38 North, Range 14, East of the Third Principal Meridian, which lies more than"
 . . . (then follows a description of a prohibition district by boundary lines).

It will be observed that said Section prohibits the granting of licenses to keep a "saloon."

Section 14 of said chapter is:

"All applications for license to keep a saloon shall be made to the Board of Trustees in writing, stating the time for which such license is desired, not less than three months nor more than one year; signed by the applicant and accompanied by a petition of the majority of the legal voters of the Town residing within one-eighth of a mile from the place where

such saloon is to be kept; such petitions shall also state that the place where such saloon is to be kept does not fall within the restriction prescribed by Section 13 of this chapter, and the license fee must also accompany each application. Provided, however, that it shall not be necessary for any applicant to furnish more than one such petition of the majority of the legal voters during each year."

It will be observed that said Section 14 refers only to the granting of a license to keep a "saloon."

Neither of these sections use the term "dram shop", and in this respect differ from the ordinances of "Hyde Park."

Section 18 of an act "to provide for the annexation of cities," etc., approved and in force April 25, 1889, provides that:

"When a part or the whole of an incorporated town, village or city is annexed . . . to another . . . and prior to such annexation an ordinance was in force prohibiting the issuing of licenses to keep dram shops within said territory so annexed, or any part thereof, or providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dram shops, then such ordinance shall continue in full force and effect notwithstanding such annexation. . . ."

(See Section 228, Hurd's Revised Statutes of Illinois, 1903.)

Said Sections 13 and 14 of Chapter 57 of the Revised Ordinances of the Town of Lake regulating "saloons" are undoubtedly, under the provisions of Section 18 of the annexation act, still in full force and effect.

In our opinion, however, on account of the peculiar and narrow language used in the "Town of Lake ordinances" it is not obligatory upon promoters of dances or other entertainments in dance halls in the Town of Lake to comply with said sections before obtaining a special permit or license to sell intoxicating liquor at such entertainments under Section 116 of the city ordinances, for the reason that such places are

not "saloons" and said sections specifically refer only to "saloons."

Yours very truly,
WM. H. SEXTON,
Assistant Corporation Counsel.
JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:
EDGAR B. TOLMAN,
Corporation Counsel.

FEBRUARY 9, 1905.

EDWARD M. LAHIFF, City Collector.

Dear Sir:

We have the letter of the Acting City Collector of January 30, 1905, as follows:

"At the time the question was raised in reference to the granting of permits for the sale of liquors at halls, receptions, weddings, etc., the issuance of the same without a bond was not taken into consideration by this department, we being under the impression that a bond was necessary for saloons and wholesalers only.

"This department desires to have an opinion as to the propriety of any permit being issued by the city of Chicago, through the City Collector's office without a bond being filed for said license or permit.

"Enclosed herewith please find form of bond now being used for the issuance of saloon license. Will this bond answer the purpose? If not, what portion of the same may be used? Any other information that may be of importance to this department in connection with the issuance of license or permits under Section 116 will be appreciated."

This department has heretofore held that the special permit referred to by Section 116 of the Revised Code of Chicago of 1897, is in fact a dram shop license, and that the places licensed thereunder are dram shops and the same are, therefore, subject to the provisions of the statutes and ordinances regulating dram shops.

Section 5 of the Dram Shop Act is:

"No person shall be licensed to keep a dram shop or to sell intoxicating liquors by any County Board or the authorities of any city, town or village, unless he shall first give bond in the penal sum of three thousand dollars, payable to the people of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain either in person or property or means of support, by reason of said person so obtaining a license selling or giving away intoxicating liquors."

No person should, therefore, be licensed to sell intoxicating liquors under the provisions of Section 116 unless he shall first give the bond required by said Section 5.

The bond required by city ordinance, however, is intended to apply to saloon licenses, and does not, we think, apply to licenses issued under Section 116.

We have examined the form of bond submitted by you and have corrected the form "grocery bond" to read "dram-shop bond" and have also made some changes in the conditions of the obligation. The bond which you should require of persons applying for dram shop licenses under the provisions of Section 116 should be in the following form:

DRAM SHOP BOND

KNOW ALL MEN BY THESE PRESENTS, That we,
, as principal, and,
 as sureties of the County of Cook and State of Illinois, are held and firmly bound unto the People of the State of Illinois in the penal sum of Three Thousand Dollars (\$3,000.00) for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this day of
, A. D., 190...

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas, the above bounden has obtained a license to keep a dram shop at No. in said city, until, A. D., 190...

Now, If the saidshall well and truly pay all damages to any person or persons which they may sustain, either in person or property, or means of support, by reason of said licensee selling or giving away intoxicating liquors, then this obligation to be void, otherwise to remain in full force and effect.

.....SEAL.
SEAL.
SEAL.
SEAL.

We enclose herewith for your information copy of our letter of this date to the Mayor in regard to the issuance of licenses under said Section 116 in Hyde Park, and also a copy of our letter to the secretary of the Englewood Law and Order League in regard to the issuance of such licenses in the Town of Lake.

Yours very truly,
 WM. H. SEXTON,
Assistant Corporation Counsel.
 JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:
 EDGAR B. TOLMAN,
Corporation Counsel.

FEBRUARY 10, 1905.

TO THE HONORABLE, THE FINANCE COMMITTEE OF THE CITY COUNCIL.

Gentlemen:

In answer to your communication, requesting an opinion "as to whether or not the docks along the river can be rebuilt by special assessment," I beg leave to reply as follows:

There are two questions to be considered:

First. Whether or not the construction of docks would be a local improvement, within the meaning of the law. In 1889 the City of East St. Louis passed an ordinance for the construction of a viaduct in Broadway, across several railroad tracks and the Cahokia Creek. The cost of this improvement was assessed in part against private property benefited and

in part against the City of East St. Louis as public benefits. The objection was made in the trial court and in the Supreme Court that the improvement described was not a local improvement, within the meaning of the special assessment statute. In answer to this objection the Supreme Court, speaking by Mr. Justice Wilkins, said:

“One of the powers conferred upon the City Council in cities by Section 62, Article V., Chapter 24, of the Revised Statutes, is, ‘to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets.’ Also, ‘to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof.’ We can discover no good reason for holding, that under these powers a viaduct like the one in question may not, in a proper case, be paid for by special assessment as a local improvement. The statute does not say what shall be considered a local improvement. The determination of that question is left to the City Council. . . . Acting within the scope of the power conferred by Section 62, *supra*, the City Council in cities, . . . are the judges of the utility of an improvement upon streets, and whether such improvement shall be treated as a local improvement in raising funds to pay for it. Their decision on these questions is final. (*Fagan et al. v. City of Chicago*, 84 Ill. 227.) Of course they must act reasonably and without fraud, otherwise their action will be void.”

L. & N. R. R. Co. v. City of East St. Louis, 134 Ill. 656 (661-2).

Assuming that the construction of these docks in question would result in the enhancement of the value of property assessed for said improvement, the construction of the docks would then, in my opinion, be a local improvement, within the meaning of the law and proper subject for special assessment.

Second. In the second question are involved alternatives, viz.: is it proposed to construct the docks on private or public property? Section 53 of the Local Improvement Act provides:

“No special assessment or special tax shall be levied for any local improvement until the land necessary therefor shall

be acquired and in possession of the municipality, except in case where proceedings to acquire such land shall have been begun and proceeded to judgment."

Assuming that the land, upon which the proposed docks are to be constructed, is owned and possessed by the municipality, then, in my opinion, the improvement could be made by special assessment.

If, on the other hand, the proposed docks are to be constructed on private property such property must be first acquired by condemnation proceedings. I regard it an open question, under our present statutes, whether or not the proceeding for the condemnation of the land and the construction of the docks could be combined in one proceeding.

Respectfully submitted,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 10, 1905.

JOHN CAMPION, Fire Marshal.

Dear Sir:

I have your communication of recent date, requesting the opinion of this department as to whether a forfeiture of pay by an employe of the fire department during a suspension of duty for violation of the rules of the department should be properly credited to the pension fund, or, on the other hand, should revert to the salary fund. You call my attention to Section 4 of an amendatory act concerning the Firemen's Pension Fund, passed May 13, 1887, which, so far as pertinent to the matter here involved, provides that "All penalties imposed upon members of such fire department, shall in like manner be paid into said pension fund and considered as a part thereof, for the uses of such pension fund."

As I understand the situation, the member in this case was suspended from duty for eleven days without pay for a breach of discipline, and in that fact I see a marked difference from the case of a member who continued his services

for the city for a certain period, but was obliged to relinquish his pay as a penalty. In the former case, although the city is saved the money by reason of the suspension of the member, yet it loses his services. In the latter case the city retains the services during the period for which the member is disciplined, suffering no loss in that respect, but the member is mulcted of his compensation. Where the member is merely suspended and loses his pay through a violation of departmental rules, a fine, in my opinion, is not imposed. A fine in its nature contemplates the taking from a person of something earned and in his possession, and, in a sense, his property. The forfeiture of wages for a period during which the member has performed no services, and, consequently, has no claim to the compensation, cannot in any sense, in my opinion, be characterized as a fine under the true legal significance of that term.

I am, therefore, of the opinion that the pension fund is not entitled to the amount involved in the forfeiture by James W. Gill, assistant engineer, Engine Company No. 82, of his pay for eleven days, but that, as has been suggested, this amount should revert to the salary fund.

Respectfully yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON.

First Assistant Corporation Counsel.

FEBRUARY 10, 1905.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

I have the following letter of January 16, 1905, to this department from the Deputy Comptroller:

"The examiner of this department reports that in auditing the report of the Chicago City Railway Company for the quarter ending December 31, 1904, he finds from the books of the company that they have failed to pay the city for grip cars; that there were in use daily during the said quarter an average of 181 grip cars; and that in computing the num-

ber of cars for which licenses were to be paid during the said quarter, he finds there were 1,077 cars in use, but they paid the city on the *average* number of cars, or 811, a difference of 266 cars. Taking this quarter as a basis for estimating the number of cars in use during 1904, it would appear that there is due from this company payment for 181 grip cars at \$100, \$18,100; and 266 other cars at \$100 each, \$26,600, a total of \$44,700."

March 18, 1878, the City of Chicago passed its first street car license ordinance, fixing the license fee at \$50 per car. The validity of this exercise of the city's police power was sustained by Judge Drummond in the United States Circuit Court. (*Allerton v. City of Chicago*, 9 Bissell, 552.)

In 1883, when the twenty year extension was granted to the City Railway Company as a temporary solution of the controversies between the company and the city, the ordinance of 1878 was superseded by provisions in the ordinance of July 30, 1883, which provides as follows:

"In computing the number of cars upon which said license charge may be imposed, thirteen round trips when a car is used in the transportation of passengers shall be taken as equivalent to one day's use of one car. . . ."

This change from the plan of charging a license fee on every car in use by the adoption of a plan of charging a license fee on every car making thirteen trips a day was a part of the terms of the settlement of the controversies then existing.

The twenty year extension provided for by said ordinance of July 30, 1883, expired July 30, 1903, and has been since extended from time to time for short periods during the pendency of negotiations for a settlement of the controversies. The last of these extension ordinances was passed March 14, 1904. In Section 3 of said ordinance it is provided that in consideration of the extension granted and of the valuable privilege given of operating the Indiana avenue cars on the downtown loop by overhead electric power, the Chicago City Railway Company shall "pay to the City of Chicago the sum of one hundred dollars per car per annum on each and every car that is used in the exercise of the privileges granted in said

Section 1, irrespective of the number of miles such car travels.”

Clearly the intention of this language was to cut out the “thirteen trips per day” provision of the former ordinance, and restore the original plan of making the license applicable to every car used. The words “irrespective of the number of miles such car travels” would be absolutely meaningless if the average number of trips which it makes was still to remain the controlling feature in the computation of the number of cars.

The provisions in said ordinance that the other terms and conditions of prior car license ordinances should remain in effect must, of course, refer to provisions other than those which have a relation to the number of miles which a car travels, for example: Section 2 of the ordinance of 1883, with regard to the improvement and repair of streets and Sections 1 and 2 of the ordinances of November 3, 1903; February 4, 1904, and February 29, 1904, which commonly provide that the permission to continue in operation of the lines should be

“without in any manner impairing, changing or altering the then existing rights, duties and obligations of said company and of the City of Chicago respectively, or as a waiver or surrender either by said city or by said company of any of their respective claims.”

It appears from your letter that the Chicago City Railway Company, in the quarter ending December 31, 1904, has failed to pay the city the prescribed car license fee for grip cars. This department has already held that the license fee is applicable to grip cars, the same being cars used “for the transportation of passengers.”

It also appears from your letter that there were in daily use during said quarter an average of 181 grip cars. The license fee must be paid, not on the *average* number of grip cars used, but on the actual total number of grip cars used. Your letter also shows that in computing the number of cars for which license fees were to be paid during the quarter there were 1,077 cars in use, but that the company paid the city on the average number of 811, a difference of 266 cars, making a difference as stated by you, of about \$44,700 due

the city, including grip cars and other cars for which payment was not made. The amount is probably more than this in view of the fact that you have adopted the company's theory of computing the average number of grip cars in use. Licenses for the year 1904 are to be computed by counting the number of cars actually used and applying to that number of cars the license fee of \$100. The fact that a car was used for one day during this year makes the city entitled to charge its license fee of \$100 thereon.

When the negotiations of this Indiana avenue trolley privilege and the temporary extensions were going on between myself and the general counsel for the City Railway Company there was no difference of opinion whatever in regard to this matter, and I am satisfied that when the matter is called to his attention he must adopt the views which I have above expressed. I cannot believe that this report has been wilfully made in repudiation of the obligations of the company; that while it retains the privileges given to it by said ordinances under a solemn truce it is attempting to escape the payment of the sums therein provided for as its part of the contract. The report must have been made, in my opinion, under a misapprehension by some minor official of the meaning of Section 3 of the ordinance aforesaid, and I believe that if you will call the attention of the company to the matter they will hasten to extricate themselves from a position which places upon them the imputation of bad faith, and will pay the delinquent car license fees in accordance with the plain meaning of its language as above set forth.

Yours respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

FEBRUARY 10, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

We acknowledge receipt of your letter enclosing one from Thomas A. Lilly, 422 West Twelfth street, regarding a refund on account of a water pipe extension.

Dr. Lilly says that he has paid a special assessment,

Warrant 17,292, for the laying of a six-inch water main in Albany avenue; that this pipe pays an annual revenue of only five cents per lineal foot; that Douglas Park is on the opposite side of the street, and is supplied, in part, through this main; that further south of his property, and on the west side of the street in which this main is laid, is a charitable institution he terms the Jewish Home, and that this institution is supplied with water through this six-inch main; and he believes that the water supplied to this park and this charitable institution should be reckoned in with that supplied to private consumers who pay for their water. The tenor of his letter indicates that it is his belief that if a charge is made for water supplied these institutions, the revenue will be considerably more than ten cents per lineal foot per annum.

We are of the opinion that, as the ordinances now stand, it is not within your power to treat the park and this charitable institution as paying concerns in determining whether this six-inch main does or does not pay the necessary revenue. In equity such a course should be pursued, but you are bound by the strict rules of the ordinance. So we are of the opinion that this claim must be rejected.

Herewith we return Dr. Lilly's letter.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

FEBRUARY 10, 1905.

JOHN W. ECKHART, ESQ.,

President Board of Directors Chicago Public Library.

Dear Sir:

We acknowledge receipt of your letter inquiring whether the Board of Directors of the Chicago Public Library has the right to borrow money or issue bonds for the purpose of putting up a library building.

We find no authority for an issue of bonds by the Library Board itself. There is authority for the issue of bonds of

the city, by the city, for the purpose of raising a fund to be used in the construction of a library building, but this is not broad enough to enable the Board itself to issue its own bonds.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

FEBRUARY 11, 1905.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

Answering your various letters of recent date in regard to the claim of Farson, Leach & Co. and E. H. Rollins & Son for \$20,000 in the matter of the recent sale of "Permanent Improvement Bonds" to said houses, I beg leave to say:

Upon the receipt of your letter I arranged for a hearing in this office at which the attorney for the claimants might have an opportunity to present the arguments and authorities in favor of his claim. I have been furnished with a written brief upon the subject and it now appears that the claim is that the bid submitted provided for the payment of a premium of \$50,197, and in addition the accrued interest thereon to the date of sale. The bids were awarded on August 1, 1904; the bonds were not delivered until October 1, 1904. When the successful bidders took up the bonds on October 1, 1904, they tendered you par, plus accrued interest to August 1. You refused to accept this sum and required them to pay the accrued interest to October 1, the date of delivery. This difference of \$20,000 the successful bidders paid under protest, and their claim is for the recovery thereof.

Counsel for claimants says that said bid was for interest from July 1 to the date of sale, and says: "Date of sale has a definite meaning, and means the date on which the contract was closed," and cites *Williamson v. Barry*, 8 How., 544.

If it were necessary, I should be prepared to dissent from counsel for claimants in his statement of what the contract really was, but since there is another conclusive answer to

this claim, even upon his own interpretation of the contract, it is entirely unnecessary to discuss what the contract was.

Assuming that the contract was as stated by counsel for claimants—to pay par premium and accrued interest to date of sale—the date of sale was not August 1st, the date of the acceptance of the bids, but October 1st, the date of delivery. Counsel entirely overlooked the modifications of the elementary definition of the term sale upon which he relies. Our Supreme Court has said:

“There is a material distinction between a sale and delivery of goods, and a mere contract for a sale. In the one case the title to the goods passes to the vendee, in the other it remains in the original owner.”

Jennings v. Gage, 13 Ill. 610, 613.

“The title to personal property does not pass to the purchaser until the purchase is completed and nothing remains to be done under the agreement.”

Schneider v. Westerman, 25 Ill. 514.

Mr. Benjamin in his work on “Sales” emphasizes the distinction between these two contracts, and shows that where anything remains to be done for the consummation of the sale there is no sale until that thing is done; the first contract being a contract *for* the sale, the contract *of* sale dating from the consummation thereof by delivery.

(See pages 95 and 321, 6th Am. Ed.)

See also:

O’Keeffe v. Kellogg, 15 Ill. 347;

Wright v. Gardner, 64 Ill. 94, 98;

Blackburn on Sales, page 151;

Benjamin on Sales, 2d Ed., p. 257, and many cases cited in the notes to the above text book references.

The bonds in question were not in existence on August 1st, at the time the bids were opened and awarded. They had not then been even printed. They were not begun to be engraved until after the awards were made, and the execution thereof was not completed until the first day of October.

In these circumstances the acceptance of the bid constituted the making of an executory contract for the sale of the

bonds, which did not become consummated until the delivery, and the claim must, in my opinion, be disallowed.

Yours very truly,

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 21, 1905.

TO THE MEMBERS OF THE CONFERENCE AND CONCILIATION
COMMITTEES ON REVENUE FROM THE CITY COUNCIL,
THE BOARD OF COUNTY COMMISSIONERS, THE REAL
ESTATE BOARD, THE MERCHANTS' CLUB, AND THE
COMMERCIAL ASSOCIATION.

Gentlemen:

Unless the differences which exist in this community concerning the revenue law are settled by mutual agreement and the results embodied in legislation which shall be just, alike to those who pay the taxes and to those charged with the duty of the administration of public affairs, the beneficent results which were hoped to be achieved by the "New Charter" movement will not be realized. We may abolish the present unsatisfactory system of justice courts and constables and supersede them by an ideal system of municipal courts; we may amend the Cities and Villages Act and give to Chicago greater power of local self government and establish the best possible system of laws concerning the power and the duties of the city and its officers and its municipal machinery; we may consolidate the multiplied and unnecessary taxing bodies; and yet, if we leave in existence a revenue system which either lays a burden of taxation on the citizen greater than is necessary for the economical administration of municipal affairs, or produces a revenue inadequate for the protection of life and property, and for the administration of an efficient government, we will have wrought in vain.

I shall not enter into any extended discussion in regard to Chicago's financial needs. The Chairman of the Finance Committee of the City Council (than whom there is no better authority on this question) states that Chicago absolutely needs a very substantial increase in its income, and I shall ask him to address you upon that phase of the subject.

Certain significant undisputed facts may well be considered.

Chicago's expenditure for police is less than one-half that of any other large city in the country when figured per capita of population, and between one-third and one-fourth as much when figured by the mileage of streets to be patrolled and protected by the police. The same startling discrepancy exists in regard to its fire department; while the money which it has available for cleaning, paving and repairing streets, when compared with that of other great cities, is from one-third to one-tenth as much as that expended in our sister cities. It cannot be said that the fault arises from an improper distribution of the city's revenue. For years a non-partisan Finance Committee has struggled with the problem of how to make too little money go far enough, and upon its distribution of the income, taking into consideration all the circumstances, I have never heard a successful criticism.

It is none the less true that the taxation of personal property in this city is a mere farce; that it practically escapes taxation, while the burden falls upon realty.

Under the operation of the present law a limitation is placed upon the total rate of taxes to be extended of five per cent, with certain exceptions, not now material to be discussed.

I think that no one objects to the fundamental principle embodied in the Juul law, to wit: that there should be a limit to taxation. The Juul law, however, contains other provisions which have produced very curious and I believe entirely unexpected results. I refer to those provisions of the law which require the ascertainment of the district in which the highest aggregate levies are made, the scaling of those levies to five per cent, and the establishment thereby of scaled rates for all taxing bodies applicable, not to the district alone in which the levies were the highest, but to the entire city and county. The evil results of this feature of the Juul law are:

(1) It is impossible to know, when the various taxing bodies are making their appropriations, what their revenue will be. It is certainly fundamentally wrong to tolerate a

system which makes it impossible to know one's income until after one's expenditures have been determined upon.

(2) It makes an economical appropriation impossible, because the taxing authorities, knowing that their levy is subject to being scaled as a result of the extravagance of some other taxing body, are compelled, in self protection, to appropriate and levy to the highest possible point in order to meet this unknown and unknowable reduction.

I believe that we have before us the opportunity of preserving the good features of the present revenue law and eliminating these unnecessary features which have been found to be productive of evil.

I submit to your careful consideration a plan to make *now* specific limitations upon the taxing power of *each* taxing body; in other words, to do the scaling *now* in a clear and unmistakable way once for all, so that the taxing bodies may know what their income is to be and may make their appropriations accordingly.

In the table submitted herewith the first column represents the maximum taxing rates established by law and the original gross amounts of the levies thereunder. The second column represents the actual levies after the scaling process has been applied. The third column is a suggestion of proposed rates to be fixed by the Legislature and neither to be exceeded by tax levying bodies nor scaled by the County Clerk. These proposed rates are intended to cover the sinking fund levies also.

It seems to me that this plan is better than any of the temporary expedients which have been under consideration, attempting to take certain levies out of the scaling process in whole or in part. Such measures still preserve the evils of the present law to which I have already referred. The increase of taxation provided by this plan is very slight. I believe it to be the minimum under which the taxing bodies can honestly pay their debts and discharge their duties to the public. It will also be a decided advantage to secure a certain degree of finality to our revenue legislation.

If a bill be drawn along the lines of this suggestion, and passed under the authority of the recent constitutional amend-

ment, subject to approval by the voters of this city, a degree of permanence will be reached which I think will be of great value.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

FEBRUARY 21, 1905.

MR. FRED C. BENDER, City Clerk.

Dear Sir:

We acknowledge receipt of your letter requesting an opinion as to the duties of the City Clerk as *ex officio* Town Clerk of the various towns of the City of Chicago, in the matter of the calling of an election in the various towns for the office of "constable" at the coming election, in which you state that you are in doubt as to whether or not that duty devolves upon your office or upon the Board of Election Commissioners.

The township organization law fixes the date of the annual township meeting for the election of town officers for the first Tuesday in April in each year, and provides that:

"Notice of the time and place of holding town meetings shall be given by the Town Clerk, or in his absence, the Supervisor, Assessor or Collector, by posting written or printed notices in three of the most public places in the town at least ten days prior to the meeting, and if there is a newspaper published in the town, by at least one publication therein prior to the meeting."

I have not been able to discover any statute that takes this duty away from the Town Clerk, and it is, therefore, your duty as *ex officio* Town Clerk to call elections for Constable in the various towns in the City of Chicago.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

FEBRUARY 25, 1905.

MILTON J. FOREMAN, ESQ., Chairman Committee on Local
Transportation, of the City Council.

Dear Sir:

In the examination of the existing ordinances of the Chicago General Railway Company, West Chicago Street Railroad Company and Chicago City Railway Company, in relation to the steps which were recently taken and resulted in the establishment of agreed exchange of transfers on Ashland avenue, my attention has been called to the fact that the Chicago General Railway Company is operating by assignment a line of street railway on Throop street, from Twenty-second street south across the river to Thirty-ninth street.

The original ordinance for this line was passed February 4, 1895. It ran to the West Chicago Street Railroad Company. (Special Ordinances, p. 1649.) It authorized the construction of a line on Throop street as far north as Taylor street, but no construction was had on said street north of Twenty-first street. The assignment of this line to the Chicago General Railway Company contains clauses which clearly show that the construction was purposely stopped at Twenty-second street in order to prevent the establishment of a transfer point between the Chicago General Railway Company and the West Chicago Street Railroad Company at Twenty-first street. The extension of this track on Throop street, from Twenty-second street north to Twenty-first street, would result in the establishment of a transfer point of great practical value to the people of the west side who desire to travel to the stock yards. For the great mass of west-siders this would be the most direct route to the stock yards, being more convenient than Halsted street and affording relief to the intolerable congestion on that line.

The ordinance of the Chicago General Railway Company on Throop street expires in 1915. It is a twenty-year ordinance, in no way affected by the claims under the "Ninety-nine Year Act." I recommend that the city exercise its police power against the Chicago General Railway Company and

compel it to extend its tracks from Twenty-second street to Twenty-first street on Throop street.

It is of special importance to observe that this line would intersect the Chicago Passenger Railway line on Twenty-first street which expires January 11, 1906.

The strategic importance of the establishment of such a transfer point, in view of the near expiration of the Chicago Passenger Railway Company lines, cannot be overestimated.

I submit you herewith a form of order to carry out the suggestions of this letter.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

FEBRUARY 27, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

We acknowledge the receipt of your letter enclosing a communication from E. A. Cummings & Co., requesting the return of money deposited on account of the laying of water mains in Robey and other streets.

In their letter E. A. Cummings & Co. say:

"We deposited with the city on the 29th of November, 1890, \$5,801.92 for the purpose of laying water pipes on Robey street, from Sixty-seventh to Sixty-eighth street; Dakota from Robey to Leavitt, Sixty-eighth from Robey to Leavitt, and on Marlboro from Robey to Leavitt. We claim that when this certificate was issued the water rates were so much, and that according to those water rates at the time the contract was made, there is more than enough revenue to enable us to secure a return of the deposit. The contract reads, 'When the estimated permanent revenue shall equal five cents per foot, per annum.' We claim that the amount is now more than enough to pay the five per cent. We also claim that as this contract was a contract made with the city at the time, any change made in the water rates will not affect our contract, and we are entitled to a return of our money."

We are of the opinion that the ordinance fixing the water rates at the time this deposit was made became and was a part

of the contract between the city and the depositor, and that in determining whether the pipe does or does not pay the revenue stipulated in the certificate, the rates are to be ascertained by reference to that ordinance and not to the ordinance passed subsequently.

If the revenue derived from these pipes, as ascertained by reference to the old ordinance, does pay the stipulated revenue, E. A. Cummings & Co. are entitled, at least, to a new certificate under the ordinance of January, 1904.

Herewith we return letter of E. A. Cummings & Co.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

MARCH 3, 1905.

MR. E. B. ELLICOTT, City Electrician.

Dear Sir:

I acknowledge receipt of your letter of October 29th, asking for an opinion as to the method of measuring the number of square feet of the star shape electric sign of the Stern Clothing Company, 256 East North avenue, in which you say you have computed the amount due by measuring the sign from the extreme top, bottom and sides, regardless of the actual area of the sign surface.

Section 2 of the ordinance passed December 21, 1903, as amended April 6, 1904, page 2908, of Council proceedings, provides in part as follows:

“The fee for all projecting signs, including vertical as well as horizontal, shall be computed at the rate of fifteen (15) cents per square foot of each and every illuminated side of such electric sign.”

I am of the opinion that the proper method of measuring the space of, and computing the amount due from signs of

this character is by treating it as if it were solid from top to bottom and side to side.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

MARCH 4, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your letter of February 28th, asking my opinion upon the legality of a "joint petition" for a dram shop license in the Hyde Park local option district, I beg leave to say:

The facts as stated in your letter are, that one Hermestroff secured a petition for the issuance of a license to him, at the corner of Sixty-third street and Marshfield avenue; that the petition contained one hundred names, and the amount being less than a majority of the frontage in the block, the petition was withdrawn; that a second petition was prepared and circulated for the issuance of a license to F. Paola for the same location, to which were secured thirty-eight names, and that thereupon the two petitions were combined and presented to the City Collector's office; whereupon, the signatures of both petitions constituting a majority of the block, a license was issued in favor of the firm of Paola & Hermestroff.

I am of the opinion that the license was improperly issued, and that the petition so obtained and presented was invalid.

Those who signed the petition for the granting of a license to Hermestroff at the corner of Sixty-third street and Marshfield avenue are supposed to have taken into consideration the character of the man, and there is no inference that they would have consented to the granting of a petition to any other person at that location. In like manner, those who consented to the issuance of a license to F. Paola are presumed to have based their consent upon their opinion of the

character of Paola, and not of any other person. There is no reason to believe that they would have consented to the issuance of a license at that location to the other man.

The combination of these two petitions does not constitute a consent to the issuance of a license to Paola & Hermestroff as a firm. The signatures cannot be taken in favor of the issuance of a license to such a firm, for thirty-eight of the signers have not consented to the issuance of a license to Hermestroff and one hundred of them have not consented to the issuance of a license to Paola.

Even if this be not a subterfuge, it is insufficient and inoperative, but the circumstances are so peculiar that no other rational hypothesis exists than that the extraordinary proceedings were intended to evade the provisions of the law.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 4, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

I acknowledge your letter of recent date in re Gielow and Sullivan.

The facts in this case are stated in the opinion of Assistant Corporation Counsel Cecil Page, dated February 3, 1905, which holds that if the Comptroller should pay Gielow and Sullivan the salary for the positions which they are occupying there would be no liability on the part of the city, upon the well established principle that a *de facto* officer, performing in good faith the duties of his office, may be paid the salary fixed for compensation for such services without incurring any liability on the part of the city subsequently to pay the same amount again to the *de jure* officer, and that in such case the remedy of the *de jure* officer is by action direct against the *de facto* officer to recover the money. This opinion was approved by First Assistant Corporation Counsel William H. Sexton, and I have carefully examined it and entirely concur in the conclusions reached.

You now ask me whether the disbursing officers of the

city—the Treasurer and Comptroller—are not only safe in paying but are under obligation to pay these salaries to Gielow and Sullivan.

Before answering this question it becomes material to consider what has developed in this matter since the date of your letter. Within a day or two after your letter of inquiry, a quo warranto suit was brought by the State's Attorney, upon the relation of Patrick McDonnell, to test the title of Gielow and Sullivan to the positions under discussion. McDonnell claimed that he should have been certified to the position before either of said persons named, and that their certification was illegal, and that they were not eligible to take the examination for the position. This case has been fully argued before Judge Mack, and a decision this day rendered adverse to the contention of McDonnell and in favor of Gielow and Sullivan, and the quo warranto proceedings dismissed. McDonnell has prayed an appeal from the judgment of the court.

These circumstances have a very material bearing upon the question which you propound. The judgment entered by Judge Mack amounts to an adjudication that Gielow and Sullivan are entitled *de jure* to the positions in question and entitled to the salary and emoluments thereof. The judgment establishes their status as *de jure* incumbents of the position. An appeal from this judgment does not affect the judgment itself nor in any way affect its conclusiveness as an adjudication upon the legal status of the parties. (*Faunce v. The People*, 51 Ill. 311; *Moore v. Williams*, 132 Ill. 589; *The People v. Rickert*, 159 Ill. 496; *Curtis v. Root*, 28 Ill. 367; *Oakes v. Williams*, 107 Ill. 158.)

It would be contrary to the established policy of the city to refuse to recognize the force and effect of this decision during the pendency of an appeal. It is only under special and extraordinary circumstances that the city puts itself in defiance of the judgments of the court in injunction, mandamus or quo warranto proceedings during the pendency of appeals therein.

The Supreme Court of Georgia has said, upon the ques-

tion of payment of salary pending a dispute as to the tenure of office:

“For purposes of public policy it is a settled rule that an officer *de facto* may do legal acts though his title to the office may be defective; Code, Section 120. The same public policy which establishes this rule prevents the courts from interfering to disturb the *de facto* officer in the receipt of the fees. If he works he must live. The law authorizes him to demand his fees on the performance of the work.”

Stone v. Wetmore, 42 Ga. 601.

In the case just cited the reasoning of the court was applied to *de facto* officers, and where, as in this case, the court has adjudicated the rights of the contending parties, the reasoning applies still more strongly.

If the disbursing officers should undertake to themselves pass upon the question of who is entitled to the office, or if they should refuse to pay salaries to incumbents regularly certified by the Civil Service Commission and actually performing the duties of the positions, the public service of the city might be crippled. If some one should raise the point that every existing officer and employe of the city had been improperly certified under the civil service rules, a disbursing officer who claimed the right to withhold the pay of officers and employes whose tenure of office was challenged, might tie up the whole city pay-roll and paralyze the municipal machinery. On this point the Supreme Court of New York said:

“The services of persons clothed with an official character are constantly needed. They are called upon to execute the process of the courts and to perform a great variety of acts affecting the public and individuals. It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the *de facto* officer, except at the peril of paying it a second time, if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed and its efficiency

impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions."

Dolan v. Mayor, 68 N. Y. 274-280.

The Supreme Court of Missouri has also passed upon a similar case, not nearly so strong as the one now under consideration, and has used the following language:

"The commission issued to the relator invested him with the title, and is *prima facie* evidence of his right to the office. It gave him the possession and the power to exercise its functions, of which he could be deprived only on due process, in the manner prescribed by law. *State ex rel. Vail v. Draper*, 48 Mo. 213. He alone is entitled to the emoluments of the office, until the State, by a proper proceeding, has revoked the authority with which it has invested him. Meanwhile the Auditor cannot rightfully withhold the salary. There could therefore be no legal claim against the State for the salary so paid on the part of one who might hereafter establish a better right to the office. His recourse, if he has any, would in such case be against the relator, not the State. (*The Auditor of Wayne Co. v. Benoist*, and the authorities there cited, 20 Michigan, 176; *Hunter v. Chandler*, 45 Mo. 452.)

State ex rel. v. Clarke, 52 Mo. 508.

In Mr. Page's opinion above referred to he called attention to an utterance of the Supreme Court of Illinois upon this subject, which will bear repeating:

"Public policy will prevent the courts from interfering to disturb a *de facto* officer in the receipt of the fees."

Burgess v. Davis et al., 138 Ill. 578, p. 582.

If the courts recognize that such public policy is binding upon them, how much more should ministerial officers yield obedience to these same considerations of public policy.

Even if the quo warranto case above referred to had not been brought and determined, there are very respectable authorities which would sustain the proposition that mandamus would lie on behalf of Gielow and Sullivan to compel the payment of their compensation. Another line of cases holds that mandamus in such case would not lie, and *that*

question may be considered as in doubt; but where the status of the parties has been determined by judicial proceedings, I believe the universal current of authority to be that *mandamus* would lie to compel the payment of the compensation.

In view, therefore, of the adjudication above referred to, I am of the opinion that what was said in the opinion of this department with regard to the safety of payment by the city must now be added the conclusion that the city is *under obligation* to pay the compensation, and that the disbursing officers of the city have no right to refuse to pay the salaries to Gielow and Sullivan.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 10, 1905.

FRANK I. BENNETT, Esq., Chairman,

Committee on Finance of the City Council.

Dear Sir:

Your recent communication regarding the claims of police officers William R. Jones and William Davis, for wages during suspension, present practically the same questions for determination and will be answered together.

Both officers, according to the information furnished by your communications and by the police department, were indicted by the grand jury during the recent so-called "Graft Investigation" and both upon trial were acquitted. After the true bills had been returned against them, both officers were requested to apply for, and they were given, furloughs; Officer Jones being on furlough until reinstated (about four months). Officer Davis' trial did not take place until almost one year and nine months after he first went on leave. He continued on furlough for a year, when his name was placed upon the eligible register according to the provisions of Section 4, Rule 14, of the Civil Service Commission, where it remained until he was acquitted; whereupon, the General Superintendent immediately returned him to duty.

In the eyes of the law and as a matter of fact, so far as I am informed, both of these officers were unjustly accused

and guiltless, and their temporary separation from the force, and their consequent loss of pay was the result of no fault of theirs, but apart from any moral or equitable claim which they might have against the city, I am of the opinion that there is no legal liability on the part of the city to pay them their salaries while so separated from the police force.

In the absence of express limitation, I am of the opinion that where guiltiness of the offense charged will involve a dismissal from office, that there is the implied power to suspend until the truthfulness of the charges can be determined. (Smith's Modern Law of Mun. Corps., Vol 2, Sec. 1381.)

Respectfully yours,

CECIL PAGE,.

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

MARCH 10, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Under date of February 3, 1905, you addressed a letter to this department as follows:

"The Sanitary District has indicated that it wishes to build a new bascule bridge at Dearborn street. The People's Gas Light & Coke Company has two tunnels across the river at this point. These tunnels interfere with the construction of this new bridge. In order to span these tunnels there would be an additional cost of at least \$20,000, which additional cost the Sanitary District does not wish to incur, claiming that the City of Chicago should deliver the site free and clear of all obstructions. This gas company has been notified to remove said tunnels to a different location, which it refused to do on the plea that under its franchise the City of Chicago had no right to interfere with same.

"In view of this, will you kindly advise me as to whether or not the city can by process of law compel the removal of these tunnels and oblige. I wish you would give me this information so that if it be necessary that the city should ex-

pend this additional cost I may take the matter up with the Finance Committee before the appropriation bill is reported to the City Council."

In reply I beg leave to call your attention to our letter of September 9, 1903, wherein your inquiry was fully answered, and which reads as follows:

"You have requested this department to inform you whether the city has authority to compel the gas company to remove or rearrange its tunnels under the river at Dearborn street to permit the erection of a new bridge by the Sanitary District.

"Replying to your inquiry, I beg leave to say that the bridge over the Chicago River at Dearborn street and the ground underneath the river at that point are a part of Dearborn street, and the city is charged with the duty of keeping the same in a reasonably safe condition for public travel. The gas company is a mere licensee, and occupies space under the said bridge subject to the paramount rights and duties of the City of Chicago. If the city itself were about to construct a new bridge I have no doubt that it could compel the gas company to remove or rearrange the said tunnels; the fact that the Sanitary District is to build the bridge does not in my opinion affect the question in any way (see authorities collected in Vol. 36, American Digest, Section 733).

"In the view above taken of this question it is immaterial whether the gas company ever had a permit to construct these tunnels or not, as the rights of the city would be paramount in either case.

"For the reasons above stated I am of the opinion that the city has the authority and the power to compel the gas company to remove or rearrange said tunnels at the expense of the said gas company."

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

MARCH 10, 1905.

F. I. BENNETT, ESQ., Chairman Committee on Finance of the
City Council.

Dear Sir:

The Inter Ocean Publishing Company had the contract for the city printing for the period expiring in March, 1900. Owing to a delay in the letting of the new contract, there was a lapse of time between the expiration of this Inter Ocean contract and the new contract, during which period there was no official city paper. Notwithstanding this, the various departments continued to send to the Inter Ocean all matter required to be advertised and these advertisements were published in the Inter Ocean. The Inter Ocean brought suit to recover from the city its bill for this advertising, charging at the old contract price, which is very much less than the regular rate. The suit resulted in a judgment in favor of the company against the city for \$703.26, which is at the old contract price.

Although there was no warrant in law for this advertising, consequently, no legal liability on the part of the city, there is a moral obligation on the part of the city to pay for this work, and we would suggest that it would be best to permit this judgment to become final and to waive our right of appeal or writ of error therefrom.

We wish you would lay this matter before the committee and advise us of its opinion.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

MARCH 13, 1905.

MR. E. M. LAHIFF, City Collector.

Dear Sir:

I have a communication from you of recent date requesting the opinion of this department as to whether or not it is necessary for certain dance hall proprietors, in order to obtain

special permits for maintaining bars in their dance halls, to get new frontage consents and provide a new bond, they having already furnished the requisite frontage consents and bond for an original license to keep a dram shop. Taking up the first question, as to whether or not a new bond is required, this department has heretofore held that the special permit referred to in Section 116 of the Revised Code of Chicago of 1897 is in fact a dram shop license, and that the places licensed thereunder are dram shops, and the same are therefore subject to the provisions of the statutes and ordinances regulating dram shops. Section 5 of the Dram Shop Act is:

“No person shall be licensed to keep a dram shop or to sell intoxicating liquors by any County Board or the authorities of any city, town or village, unless he shall first give bond in the penal sum of three thousand dollars, payable to the people of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain either in person or property, or means of support, by reason of said person so obtaining a license selling or giving away intoxicating liquors.”

While it may be true, as stated in the communication, that the “bars are always run in the name of and by the original licensee and in the same building,” at the same time it has always been the contention of this department that the license to sell liquor in one room in the building confers no privilege to sell it in another and different room in the same building. The places may well be considered as two dram shops. It is obvious that a license to sell liquor on the ground floor of the Masonic Temple, for instance, would confer no authority upon the licensee to sell liquor in a room upon the twentieth floor of that building. I am therefore of the opinion that dance hall proprietors desiring special permits for bars in dance halls must execute new bonds before such permits can be legally issued.

Concerning the second inquiry, as to whether new frontage consents are necessary to obtain the special bar permit:

this question depends almost entirely upon the district where such dance hall is located. As has been before said in an opinion from this department upon the question of whether the city had authority to allow the sale of intoxicating liquors in any theater, hall, or other building in which public entertainments are held for gain, or in any room or rooms connected with the same under Section 116, such place being situated in Hyde Park:

“It will, therefore, be necessary to require an applicant for a special permit or license, as authorized by Section 116 of the Revised Code of Chicago of 1897, to fully comply with the provisions of said ordinances. Each application for such special permit or license involves in the first instance the ascertainment of whether or not the location of the theater, hall or other building in which public entertainments are given for gain and in which it is proposed to sell liquor, is within any of the districts affected by the local option or prohibition ordinances passed prior to the annexation of such district to the city.

“The ordinances applicable to such local option or prohibition district must next be interpreted, for in different districts they are by no means alike. Those applicable to Hyde Park clearly apply to all ‘dram shops’, while certain of those in the Town of Lake do not apply to anything but saloons.”

Thus special bar permits in Hyde Park, under the old Hyde Park ordinances continued in force by the annexation act, are permits to keep a dram shop, and their issuance must be preceded by a proper petition signed by the persons specified in the ordinance. On the other hand, in the Town of Lake, the ordinance provisions apply simply to saloons, and this department has held that dance halls do not come within the common acceptance of the term “saloon.” Consequently, in the Town of Lake it will not be necessary for the requirements of the ordinance of the Town of Lake concerning saloons to be complied with in the case of dance halls, and in like manner, the question to be determined would depend in each instance upon the local law, where one is in force.

Knowing the locations of the dance halls whose proprie-

tors seek the information, you can advise them accordingly, keeping in view the fact that the Hyde Park ordinance restrictions upon the sale of liquor apply to dance halls, while those of the Town of Lake do not.

In the event of further inquiry being made as to how the apparent inconvenience of obtaining new frontage consents in Hyde Park for each and every permit to operate a bar in a dance hall can be avoided, I would suggest that the applicant can do away with the necessity of obtaining these special permits and frontage consents rendered necessary thereby, by obtaining a regular annual license to keep a dram shop at his dance hall.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

MARCH 13, 1905.

JOHN CAMPION, Fire Marshal.

Dear Sir:

We have your letter of recent date requesting the opinion of this department upon a communication submitted to you by two operators and three assistant operators in the fire alarm telegram branch of the Chicago Fire Department. It appears from this communication, which for the purposes of this opinion I shall regard as stating actual facts, that the five persons therein mentioned represent a class who have not been considered eligible to the benefits secured under the provisions of an Act for the "Creation of Board of Trustees of Firemen's Fund and the formation and disbursement of the fund," approved May 13, 1887. Section 11 of this act provides as follows:

"This act shall apply to all persons who are now, or shall hereafter become, members of such fire department, and all such persons shall be eligible to the benefits secured by this act."

(Hurd's R. S. Ill., 1903, p. 370.)

I learn that these applicants for recognition as beneficiaries were connected with the fire alarm service before the creation of the department now known as the Department of Electricity, and that under the ordinance creating that department these men were assigned or detailed by the fire department to the department of electricity, but that their duties are such as relate only to the fire department. I do not attach much importance to the fact that sixteen other members similarly situated are upon the pension roll, as the act of the Pension Board in placing them on, if illegal, would not be conclusive upon the present board, nor create any estoppel in favor of the present applicants, although I admit that I am impressed with the equity in favor of the applicants which this feature of the case presents.

The ordinance creating the executive department known as the Fire Department, provides that such department "shall embrace one Fire Marshal, one Assistant Fire Marshal, one Superintendent of the City Telegraph . . . and such number of Assistant Fire Marshals . . . telegraph operators, assistant clerks and employes as the City Council may by ordinance see fit to prescribe and establish."

(Revised Code of Chicago, 1897, Section 601, p. 135.)

The positions occupied by the applicants have been classified under the Civil Service and have been provided for by ordinance. The applicants are carried upon the pay rolls of the fire department. It has been pointed out to me, as the attached communication will show, that the applicants have never been sworn in as regular members of the fire department. Whether this omission might or might not affect their status as members, it is not necessary to consider, as the applicants are willing to take the oath required, and I am verbally informed that they are also willing to contribute the requisite amount of fees to the pension fund dating from their entrance into the department.

I am not unaware that this department has heretofore rendered an opinion in the case of police operators, holding that such operators are ineligible to pensions, but such opinion was based upon an entirely different statute, which provides pensions only for members of the police *force* and not for

members of the police department, as in the case of the statute under consideration. I am also not unaware that both the police and firemen's pension funds are already staggering under the weight of numerous pensions heretofore allowed, and with the limited resources at their command find the greatest difficulty in providing for such payments as the law requires.

I am constrained, however, to hold that the statute under consideration contemplates that all members of the fire department shall participate as beneficiaries in the pension fund, and that the five applicants above referred to are members of the Chicago Fire Department, and as such, entitled to have their names placed upon the pension rolls of the pension fund of said department in the event of their willingness to take the oath required by the rules of said department, and to pay all arrearages in the pension fund from the date of their entrance into said fire department to the date of their names being placed upon the pension roster.

Very truly yours,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

MARCH 13, 1905.

MICHAEL D. DOUGHERTY, Alderman, Twenty-second Ward.

Dear Sir:

Replying to your verbal inquiry of recent date concerning the legal status of Haines street, between Crosby street and the North Branch Canal, I beg leave to advise you that on March 1, 1886, an ordinance was passed by the City Council vacating said Haines street from Crosby street to the easterly line of Hawthorne avenue, and from the westerly line of Hawthorne avenue to the North Branch Canal. Said ordinance appears on page 541 of the Council proceedings of 1885-86.

An ordinance repealing the above ordinance, so far as it referred to the vacation of Haines street, was passed on May

24, 1886. (Council proceedings of 1886-87, page 108.) Said ordinance was passed upon the recommendation of the then Corporation Counsel. In his opinion the Corporation Counsel, speaking of the vacating ordinance of March 1, 1886, says:

"The Council has authority to vacate streets and alleys, or parts thereof, by ordinance, provided it is passed by a vote of three-fourths of all the Aldermen-elect, taken by ayes and noes, and entered of record. In this instance all requirements of law having been complied with, the legality of the above ordinance cannot be questioned."

It may, therefore, be assumed that the vacating ordinance was valid, and that the vacation became a fact.

The question then is, did the ordinance of May 24, 1886, purporting to repeal said vacating ordinance, have the effect of restoring said street as it was before the vacation. In the case of *Gormley v. Day*, 114 Ill., 185, the court, in considering a similar question, decided that:

"An ordinance vacating a street may be repealed before it has gone into effect, and before any rights have become vested under it."

Thus, by inference, the court seems to indicate that such an ordinance cannot be repealed after it has gone into effect.

The Supreme Court of Kansas, in a well considered case, held that a city cannot by repealing an ordinance vacating an alley re-establish the alley. The court says:

"The next proposition is, that Ordinance No. 62 repealed the vacating one, and by the repeal the city again became invested with all its former rights in the alley. This is easily disposed of by the application of not only familiar but fundamental principles. When the alley was vacated by the ordinance, it was the same in legal contemplation as if it had never existed; as if it was a town lot and not an alley The alley was not restored to the city by the operation of the repeal. If it was found that a mistake was made, and that the public convenience required the alley, the only remedy was to open it in accordance with all the requirements of law, and this would be one of the modes of the exercise of the power of eminent domain. . . .

Belleville v. Hallowell, 41 Kan. 192."

I am, therefore, of the opinion that the ordinance of May 24, 1886, was ineffectual in re-establishing Haines street, and that unless said Haines street has in the meantime been reopened by proper proceedings for that purpose, said street does not exist between the points specified in the ordinance of March 1, 1886. If it is desired to reopen said street it can only be done by proper proceedings, such as would be necessary in the case of the opening of an entirely new street.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

MARCH 16, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have your letter of February 4, 1905, transmitting copy of application of J. M. Roach, president and general manager of the Chicago Consolidated Traction Company as successor of the Ogden Street Railway Company, for a permit

“to lay an additional track in South Fortieth avenue, from the north line of West Madison street to the center line of West Taylor street, and parallel to the single track in said South Fortieth avenue between said points, and to move the present single track in said South Fortieth avenue, between said points,” etc.

June 6, 1904, the City Council passed an ordinance authorizing the Ogden Street Railway Company, its successors or assigns

“to lay down an additional track in South Fortieth avenue, from the north line of West Madison street to the center line of West Taylor street, and parallel to the single track now in said South Fortieth avenue between said points, and to move the present single track in said South Fortieth avenue between said points so that the said tracks shall occupy the center sixteen feet of said South Fortieth avenue between the points aforesaid.”

(See p. 448 *et seq.* current Council proceedings.)

The railway company has made several applications for this permit, but the same has not heretofore been granted for the reason that there has not been compliance with Section 4 of the ordinance, requiring the acceptance thereof by the Ogden Street Railway Company, the Chicago Consolidated Traction Company, assignee of said Ogden Street Railway Company, and the Chicago Union Traction Company. Said Section 4 is as follows:

“This ordinance shall take effect from and after the filing with the City Clerk of a written acceptance hereof, duly executed by the Ogden Street Railway Company, the Chicago Consolidated Traction Company, assignee of said Ogden Street Railway Company, and the Chicago Union Traction Company, said last named company being in possession of and now operating said lines, said acceptance of said Union Traction Company to be approved in writing by the receivers of said company.”

The Chicago Consolidated Traction Company filed its acceptance of said ordinance, executed by J. M. Roach, president, with the City Clerk August 24, 1904, the same being Document No. 1596.

The Ogden Street Railway Company filed its acceptance, executed by John A. Rose, its president, with the City Clerk August 24, 1904, the same being Document No. 1597.

March 13, 1905, the Chicago Union Traction Company filed its acceptance of said ordinance, the same being executed by J. M. Roach, its president, together with the approval of such acceptance by James H. Eckels, Marshall E. Sampsell and J. C. Fetzer, receivers of the Chicago Union Traction Company, no file number at the present being upon said acceptance.

Said ordinance having been accepted by the three companies designated in Section 4, and the receivers of the Chicago Union Traction Company having filed their approval of the acceptance of the ordinance by said Chicago Union Traction Company, there is no legal objection to the issuance of a permit to the Chicago Consolidated Traction Company

“to lay down an additional track in South Fortieth avenue, from the north line of West Madison street to the center

line of West Taylor street, and parallel to the single track now in said Fortieth avenue between said points, and to move the present single track in said South Fortieth avenue between said points so that the said tracks shall occupy the center sixteen feet of said South Fortieth avenue between the points aforesaid."

You should, however, in compliance with the provisions of Section 2 of said ordinance, insert in the permit the following:

"This permit is issued under authority of the ordinance of June 6, 1904, printed at pages 448, *et seq.* of the Council proceedings of 1904-5, and it is hereby stipulated that, if at any time in the future the City of Chicago shall take proceedings to acquire the ownership of any of the lines mentioned in the ordinance of February 18, 1895, granting to the Ogden Street Railway Company the right and privilege to lay down, construct, maintain and operate for the period of twenty years from the date of the passage thereof, a single or double track street railroad on certain streets therein named, including South Fortieth avenue, otherwise known as Crawford avenue, from the north line of West Madison street to the center line of Thirty-first street, or if the city may elect to cause the value of said lines, or any part thereof, to be ascertained by appraisement, condemnation or otherwise, said valuation shall be made as though this grant had never been made, and as though the lines in said ordinance of February 18, 1895, were then, as now, operated in connection with a single track railway on said South Fortieth avenue between West Taylor and West Madison streets; and the tracks herein authorized to be laid, if so taken or appraised shall be appraised in like manner and under like conditions and restrictions, so that nothing resulting from the permission and authority granted by said ordinance of June 6, 1904, shall ever operate to appreciate the value of the street railway rights in said street as now existing."

The applicant has failed to transmit with said application a sketch showing the nature of the work proposed, and although in this instance it may be unnecessary so to do, it would nevertheless make the records of your department

more complete if such sketch were affixed to the papers herein.

I return herewith said application.

Yours very truly,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 17, 1905.

MR. GEORGE WILLIAMS, Building Commissioner.

Dear Sir:

March 14, 1905, you requested our opinion on the application of the Chicago Opera House, contained in the following letter from Mr. George A. Trude:

"On account of the inability of the proprietor of the Chicago Opera House in this city to ventilate the theater properly, permission is hereby asked to remove the wall now placed after the last row of seats in said theater, which was erected, in my judgment, by reason of an erroneous construction of the following section of the revised ordinance of the city, passed July 18, 1904, which is in words as follows:

" 'No foyer shall be open to the theater proper, excepting through the exits.'

"The definition given of 'foyer' by the Century Dictionary is as follows: 'Hearth, fireside, green room in theaters, opera houses, etc., and public room at or near the entrance.'

"The Standard Dictionary defines 'foyer' as follows: 'A public room or meeting place in a theater or opera house, usually near the auditorium.'

"By an inspection of the plans of the first floor of the Chicago Opera House—which plans are now on file in your office—you will observe that to the right of the entrance is a room which is the foyer, because it is a public room and meeting place in a theater and near the auditorium. That part of the auditorium back of the seats in the theater herein named is an aisle, in which no person is permitted to loiter or stand; and the same being only wide enough to meet with the requirements of the ordinance—for the reasons herein stated—I insist that the wall is not required by the ordinance of

the city, and therefore the permission herein asked should be granted."

It appears from this letter that the proprietors of the Chicago Opera House, when they made the changes in that theater required by the new Class V building ordinance, constructed a wall back of the last row of seats on the main floor of the theater. They now claim that the theater cannot be properly ventilated with the wall there, and that the said wall was constructed by them because they were of the opinion that the ordinance required it under the following provision of the Class V ordinance of July 18, 1904:

"No foyer shall be open to the theater proper, except through the exits."

(See p. 1124, current Council proceedings.)

Century Dictionary defines the word "foyer" as:

"Hearth, fireside, green room, lobby of a theater. 1. In theaters, opera houses, etc., a public room at or near the entrance next to or comprising the lobby; often, as in the Grand Opera House at Paris, a magnificent saloon, elaborately decorated."

Standard Dictionary defines the word "foyer" as:

"A public room or meeting place in a theater or opera house, usually near the auditorium."

Webster Dictionary defines the word "foyer" as:

"A lobby in a theater, a green room."

It appears from the plans of said theater that to the right of the main entrance is a room which is devoted to and used by the public separate from the main auditorium, and said room, in my opinion, comes within said definitions of the word "foyer."

In my opinion that portion of the auditorium in the rear of the seats is in fact an aisle, and can in no sense be held to be the "foyer." Said wall was not, however, constructed by the proprietors of the Chicago Opera House through any mistaken meaning of the word "foyer" and on account of the requirement of the provision of the ordinance above quoted, but because the aisles on the main floor did not lead "directly to exits", as required by the following provision of the ordinance:

"Every aisle shall lead as nearly as possible, directly to an exit, but in no case shall the center line of said exit be more than three feet from the center line of said aisle leading thereto."

(P. 1124, current Council proceedings.)

If the aisles in the main floor lead directly to an exit, then said wall will not be required. I understand that an additional exit is being placed directly in front of the north aisle of the main floor and therefore there will be compliance with this provision of the ordinance.

In my opinion there is no legal objection to allowing said wall to be removed, provided all the aisles on the main floor of said theater lead directly to exits.

If said wall is removed it will not in any manner lessen the safety of the occupants of the theater, nor interfere with their easy access to the exits.

This ruling will, however, not govern every case, but that of the Chicago Opera House alone, for the reason that each case must stand on its own footing. While other theaters in Chicago might have been required to construct a similar wall, it might not, however, have been required by reason of the provision of said ordinance that "no foyer shall be open to the theater, except through the exits," but by said section, which provides that:

"Every aisle shall lead as nearly as possible directly to an exit, but in no case shall the center line of said exit be more than three feet from the center line of said aisle leading thereto."

It is obvious that if the aisles did not lead directly to exits it would be necessary to construct and maintain a wall of this character immediately in the rear of the seats with exits at the end of each aisle, so as to comply with said section of the ordinance.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 22, 1905.

MR. WM. LUMPP, Chief Inspector of Steam Boilers and Steam Plants.

Dear Sir:

Regarding the claim of the Seventh Regiment Illinois National Guard, for exemption from the payment of the fees levied by your department for inspecting the boilers in its Armory building, I respectfully submit that in the absence of any express provisions of law providing for the exemption claimed, I am of the opinion that the Seventh Regiment must pay these fees the same as any private individual or organization.

Yours very truly,

CECIL PAGE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

MARCH 23, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

I have your letter of the 20th inst., transmitting the following application of the Chicago General Railway Company of the same date:

“On behalf of the Chicago General Railway Company and Edward F. Bryant, receiver, I hereby make application for a permit to lay down and construct a double track railway in, upon and along Throop street from the southerly line of 22d street to the southerly line of 21st street, together with all necessary curves, crossings and connections, and to erect and construct all necessary poles, trolley wires, supports and feeders for the operation of the same in conformity with the resolution of the City Council, passed March 13, 1905, and a certain ordinance granted by the City Council to the West Chicago Street Railway Company, February 4, 1895, assigned to the Chicago General Railway Company June 29, 1897.

“The middle sixteen feet of said street so occupied by said tracks, shall be paved with vitrified brick set in cement.”

March 13, 1905, the City Council adopted the following resolution:

“WHEREAS, on the fourth day of February, A. D. 1895, an ordinance was duly passed by the City Council of the City of Chicago granting to the West Chicago Street Railroad Company power and authority to operate a line of street railway on Throop street from Taylor street south to 39th street;

“WHEREAS, also, The part of said line on Throop street between Taylor street and 22d street has never been constructed and if constructed, at least between 22d and 21st streets would furnish a transfer point of great value to that part of the traveling public which desires to go from the west division of the City of Chicago to the so-called Stock Yards District; now therefore be it

“Resolved, by the City Council of the City of Chicago:

“That the Chicago General Railway Company be and said company hereby is directed to complete its said line of street railway on Throop street from 22d street north to the intersection of 21st and Throop streets, and to operate its cars over the whole of said line in accordance with the provisions of said ordinance of February 4, 1895, and all other general ordinances of the city.” (Current Council Proceedings, page 3053.)

Immediately after the passage of this resolution and order, this department on behalf of the city, filed in the receivership proceedings pending in the Circuit Court of Cook County against the Chicago General Railway Company, a petition praying that the receiver of said company be directed to construct one block of railway in Throop street between 22d and 21st streets in compliance with said resolution and order and in compliance with the provisions of the original ordinance of February 4, 1895, to the West Chicago Street Railway Company and the order was entered.

There is, therefore, no legal objection to the issuance of said permit.

The company agreed, at our request, to lay down groove rails in said block. The application requested that they be permitted to pave the middle sixteen feet of said street in said block with vitrified brick set in cement. There is no legal

objection to allowing this kind of pavement and, if in your opinion it is a proper pavement for that block, you have the power to authorize the same to be laid; if, however, in your opinion this kind of pavement is not proper, then you have the power to direct some other kind of material.

You will observe that the application is for the construction of a "double track railway . . . together with all necessary curves, crossings and connections." The original ordinance of February 4, 1895, authorizes the company to construct a "double track street railroad with all the necessary and convenient turnouts, sidetracks and switches . . . and to connect at any and all street intersections any track or tracks hereby authorized to be laid with the track or tracks of any railroad owned, leased or operated by said company."

The application also states that the company desires to construct "all necessary poles, trolley wires, supports and feeders."

Sections 6 of the ordinance of February 4, 1895, so far as material to be quoted is as follows:

"If electric power shall be used by means of overhead contact wires, such overhead wires, together with the necessary feed wires may be suspended from poles set within the curb limits of the street on either side thereof or from bracket poles in the center of the street along said line or route, *the placing of said poles to be determined by the Mayor and Commissioner of Public Works*, and said poles to be of ornamental iron or steel and of such construction and design as *the Mayor and Commissioner of Public Works* may approve. Said poles and feeder wires shall be suspended not less than eighteen and a half ($18\frac{1}{2}$) feet above the rails and said poles and supports shall be placed on an average of not less than one hundred and fifteen (115) feet apart. No poles shall be set at the intersection of streets and alleys. Such poles and wires to be erected and maintained for the purpose of supplying electric current which can be used for power, heat and light purposes. . . ."

You will observe by the portion underscored in the above quotation that the Mayor and Commissioner of Public Works

shall determine where the poles shall be set and the construction and design of the same.

The ordinance of February 4, 1895, is printed on page 1649 et seq., Special Ordinances.

I return herewith said application of the company.

Very truly yours,

WM. H. SEXTON,

First Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 29, 1905.

MR. ANDREW RINGMAN, 9912 Ewing Avenue, Chicago, Ill.

Dear Sir:

I have yours of the 28th inst., in regard to the opinion of this department of December 19, 1904, holding that the signature of Mrs. Inger Heinsen on the petition for the issuance of a saloon license to George Willey for a saloon at No. 10550 Ewing avenue, was illegal, and to our opinion of March 13, 1905, in the same case where this signature was held good.

The facts are that the first opinion was written by Assistant Corporation Counsel William Rothmann and the second by Assistant Corporation Counsel John W. Beckwith; that in each case objections to the petitions presented by the Hyde Park Protective Association were considered by these gentlemen; in the first a specific objection was made that Mrs. Heinsen did not own the property, but had merely a life estate in it; in the second the objection was not made that she was not the owner, but the holder of merely a life estate, but that her consent was signed by Squire S. Burke as agent. Under the ruling in the *Theurer* case consents to petitions of this character purporting to be signed by agents must count in favor of the applicant, unless the agency is questioned. I understand that in this case the agency was not questioned, and

that therefore, so far as the second opinion went, it met the objection raised in that specific case.

Yours very truly,

WM. H. SEXTON,

First Assistant Corporation Counsel.

MARCH 30, 1905.

FRANCIS O'NEILL, General-Superintendent of Police.

Dear Sir:

You have transmitted to this department a letter from Captain James Madden of the Seventh Police District, in which this office is requested to advise him as to the following propositions:

First. In determining the number of legal voters necessary to sign a petition for a saloon license in the Town of Lake, is it proper to count women who are registered?

Second. Should the signature of a legal voter who resides within one-eighth of a mile of the proposed saloon at the time he signs the petition, and afterwards moves outside, be counted when reporting on the petition?

Third. If a legal voter is registered in an election precinct outside a radius of one-eighth of a mile from the proposed saloon, and afterwards moves into the district when the petition is being circulated and signs the petition, should his signature be counted?

Fourth. Has a legal voter, after signing one petition, the right to withdraw his name and sign the opposing petition?

Fifth. In determining the number of legal voters within a district is the last printed polling list conclusive?

Replying to these several queries in their numerical order, I beg leave to say:

First. In my opinion a legal voter is one who possesses the qualifications prescribed by the Constitution, which are as follows:

“Any person having resided in this State one year; in the county 90 days and in the election district 30 days next preceding any election therein, who was an elector in this State on the first day of April in the year of our Lord, 1848, or

obtained a certificate of naturalization before any court of record in this State prior to the first day of January in the year of our Lord, 1870, or who shall be a male citizen of the United States above the age of 21 years, shall be entitled to vote at such an election."

(Constitution, 1870, Art. 7, Sec. 1.)

The ordinance of the Town of Lake under which the present question arises is as follows:

"All applications for license to keep a saloon shall be made to the Board of Trustees in writing, stating the time for which such license is desired not less than three (3) months nor more than one (1) year, signed by the applicant and accompanied by a petition of the majority of the legal voters of the town residing within one-eighth of a mile from the place from where such saloon is kept. . . ."

(Revised Ordinances, Town of Lake, 1887, Sec. 14.)

While there are very good reasons why women should be allowed to sign petitions of this sort or protest against them, inasmuch as women are frequently the principal sufferers from the fact of a saloon being located in the neighborhood of their homes, yet it cannot be said that women possess the constitutional qualifications to justify holding them to be legal voters within the meaning of the above quoted ordinance. It is true that women are qualified to vote for school officers, which privilege was conferred upon them by act of the legislature in force July 1, 1891. It will be observed that that act was adopted several years after the Town of Lake ordinance was in force, and therefore could not have been in the minds of the framers of that ordinance.

For the reasons above stated, it is my opinion, that women are not "legal voters" within the meaning of the ordinance of the Town of Lake above quoted, and they should not be counted in determining the number of legal voters residing within a given district.

Second. In reply to the second query, I have to say that if a legal voter signs a petition and before such petition is presented to the City Collector he moves outside of the district, his signature should not be counted for the reason that he is then no longer a "legal voter of the town residing within

one-eighth of a mile from the place where such saloon is kept.”

Third. A legal voter who is registered in an election precinct outside the one-eighth mile radius, and who moves into such district while the petition is being circulated, has a right to sign such petition and his name should be counted. As will be pointed out hereafter it is immaterial whether a legal voter is registered or not. All that is necessary is that he shall be a *legal voter* and shall reside within one-eighth of a mile of the proposed saloon.

Fourth. A legal voter, after signing a petition for a saloon license, may withdraw his signature from such petition at any time before the license is issued, and if he does so, his name should not be counted in such petition.

Fifth. The legal voters of any given district are those persons possessing the constitutional qualifications; it is immaterial whether they are registered or not, therefore the printed poll list cannot be relied upon, except that all persons whose names appear on the printed polling lists, and who are found to be still residing within the district, may be assumed to be legal voters. In order to obtain a complete list of the legal voters it will be necessary to canvass the district and ascertain the number of legal voters residing therein whose names do not appear on the printed lists, adding them to the total number of names that do appear on the lists.

Yours very truly,

WILLIAM ROTHMAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

MARCH 30, 1905.

MR. E. M. LAHIFF, City Collector.

Dear Sir:

Your favor of March 20, 1905, transmitting letter from License Officer R. J. Hogan, has been referred to me for reply.

Officer Hogan wishes to be advised as to how far it is

necessary to go for frontage consents for a saloon license for the White City, located at the southwest corner of 63d street and South Park avenue, the streets not being open west of South Park avenue between 63d and 67th streets. The question is: must the White City people obtain frontage consents the entire distance between 63d and 67th streets, or should the territory in question be treated as though the intervening streets were opened?

This is a question, which so far as I am aware, has never been passed upon by any court of last resort. The ordinance of the Town of Hyde Park, under which this question arises, requires that any person desiring a license to keep a saloon, shall present a petition with his application "signed by a majority of the property owners according to frontage on both sides of the street in the block, upon which such dram-shop is to be kept."

It is settled that under this ordinance the consent of the owners of the majority of the property on both sides of all four streets surrounding the block in which such saloon is to be located, is necessary. There is no standard by which to determine how large or how small a block shall be. It has been generally assumed heretofore by all parties concerned that a block means the territory bounded by four streets, no matter whether all the streets projected were actually opened or not. In the case of *Harrison v. The People ex rel. John Boetter*, 195 Ill., page 466, it is held that a block is the territory bounded by four streets.

The White City Amusement Park, I am informed, extends from 63d street south to or near 65th street. If, therefore, any other rule were adopted than that of requiring frontage consents on the streets actually opened around the territory, it would be difficult to see just what rule should be adopted.

I am, therefore, of the opinion that the frontage consents

must be obtained on the streets actually opened around the territory, disregarding streets that are not opened.

Yours very truly,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Assistant Corporation Counsel.

MARCH 30, 1905.

MR. F. W. BLOCKI, Commissioner of Public Works.

Dear Sir:

Several months ago you referred to this department the application of the Chicago & Western Indiana Railroad Company to repair its west track in Custom House place, between 12th and 14th streets. The application for permit to make these repairs was objected to by the General Electric Railway Company. I invited these companies to send their legal representatives to this office and present orally and by written briefs their various positions. The companies complied with this invitation and were fully heard.

It appeared that the General Electric Railway Company claimed that the tracks of the Chicago & Western Indiana Railroad Company in question were unauthorized by law and were and constituted an unlawful trespass upon the public street. The Western Indiana Railroad Company, on the other hand, claimed that the General Electric Railway Company had no standing in this controversy, because its rights in said streets were based on invalid and illegal ordinances.

Inasmuch as the railroad tracks in question were in constant and daily use, it was evident that while this matter was under consideration the rights of the traveling public on the trains of said company and of the shippers of merchandise and freight over the road, should be protected, and, the railway company being willing to enter into a stipulation that whatever was done during this period of truce might be done without prejudice to any person, I recommended that temporary repairs should be permitted on said track under an agreement that the same should be made without prejudice to

either the rights of the city or the railroad company. Such an arrangement was made, and here the matter has rested ever since, this department being engaged in other matters which seemed to be of more pressing importance.

The time has now arrived, however, when these temporary repairs must be replaced if traffic is to be continued over said tracks, otherwise the present condition of affairs may result in injury to property, if not loss of life, and I therefore now pass to the consideration of the rights of the parties.

I shall first take up the question of the rights of the General Electric Railway Company. This company claims that it has authority and permission to lay down, construct and maintain a street railway in Custom House place, from Jackson street to Fourteenth street, under an ordinance of January 13, 1896.

The ordinance had been passed at a prior meeting of the City Council and it was then passed over the veto of the Mayor.

It is stated in the veto message (Council proceedings, p. 1653, January 13, 1896) as well as in the bill filed by the Chicago & Western Indiana Railroad Company (pages 28-29 of the printed copy), that no notice of the presentation of the ordinance as passed was published ten days before the presentation or passage of the ordinance.

It is very clear that no notice of the presentation of any ordinance giving this company the right to construct or operate a street railway in Custom House place was ever published prior to the passage of the ordinance. It appears from the Council proceedings of 1895-6, pages 1508-1653, that the ordinance as originally presented to the council made no mention whatever of Custom House place, and that the clause granting permission to build and operate a track in that street was not inserted in the ordinance until the meeting at which the ordinance was passed.

It seems to me that, inasmuch as this ordinance, as to Custom House place, was passed in direct violation of the Horse and Dummy Act (Chapter 66, Revised Statutes, Section 63; *Metropolitan R. R. Co. v. Chicago*, 96 Ill. 620), the ordinance is absolutely void so far as it undertakes to grant

the right to construct and maintain a street railway in this street.

It is also charged in the Western Indiana bill that the total frontage on that street is 9,675.68 feet, and that the pretended petitions for the passage of this ordinance did not purport to contain the signatures for any more than 2,048.70 feet on this street. Other allegations are made in the bill concerning the signatures as to the frontages, lack of authority, etc., that need not be considered now, for this one fact, if it be a fact, vitiates the ordinance as to this street.

Upon several occasions when this matter was before us, counsel for the General Electric Railway Company met this allegation by the statement that as to railroad property fronting on this street, no consents or petitions were required by law.

This is the only contention made by this company, and it is one upon which no authority is cited by them and one which in my opinion cannot be sustained.

I am therefore of the opinion that this company has no right whatever to construct or operate any street railway in any part of Custom House place between Jackson street and 14th street.

I now pass to the consideration of the right of the Chicago & Western Indiana Railroad Company to maintain railroad tracks in Custom House place (formerly 4th avenue).

By Section 3 of the ordinance of August 6, 1883, said company was authorized to lay down, construct and maintain one railroad track on the east side of said portion of said street, with the provision that the west rail thereof should not be more than nine and one-half feet from the east side of the street. No question has ever arisen as to the validity of this ordinance, and that the railroad company has the right therein expressed is conceded by counsel for the General Electric Railway Company.

On the plat attached to this opinion (being the same plat submitted by the Chicago & Western Indiana Railroad Company, together with its letter of April 19, 1904, making application for leave to repair the track in question) the existing tracks on said portion of said street are plainly shown.

The first track west of the east line of Custom House place is the track which was laid under the authority of said ordinance of August 6, 1883, and is within nine and one-half feet from the east side of said street, but the track marked on said plat in red, between the letters "A" and "B" is the track particularly in controversy. Said track is entirely to the west of the track authorized to be laid by said ordinance of August 6, 1883. A continuation of said track "A"- "B" runs south nearly to 14th street, to a stub end, and at the point "B" switches and cross-over connect said west track with the track authorized by said ordinance.

The General Electric Railway Company challenges the legality of the track "A"- "B", its extension to 14th street and the switch and cross-over connecting it with the easterly track referred to above.

At the hearing in this matter counsel for the railroad company were unable to point out to me any ordinance specifically authorizing the construction of said westerly track.

Section 2 of this ordinance does authorize the use of this street for railroad purposes in a certain subdivision south of 12th street, on certain conditions, but counsel for the railroad company have submitted to me no evidence that these conditions precedent have been complied with, and even if so, a serious legal question would arise as to the power of the city to surrender such a substantial part of this public street to a private corporation to the exclusion of the traveling public.

It was argued by counsel for the Chicago & Western Indiana Railroad Company that the track elevation ordinance of October 23, 1893, authorizes this track. Paragraph 13 of Section 1 of that ordinance (page 1400, Council proceedings, 1899-1900) reads as follows:

"Paragraph 13. And in consideration of the benefits accruing to the City of Chicago by the performance of the work herein specified to be done by the Chicago & Western Indiana Railroad Company, permission is hereby granted to said company to lay and maintain tracks in so much of Dearborn street between 14th and 15th streets, and in so much of 4th avenue between 14th and Taylor streets, as may not be used under the permission heretofore granted to other cor-

porations, and the permission hereby granted is not intended to alter or affect the legal rights or equities of other corporations, if any, concerned or interested in said Dearborn street and 4th avenue."

It is claimed by the railroad company that this ordinance, which was passed after all the present existing tracks in Custom House place (except the stub track herein referred to) had been laid and placed in operation, constitutes a valid ratification of the right of the company to maintain the track in question. On the other hand, the General Electric Railway Company claims that, since by ordinance it had certain rights in said street, and this was a grant to the railroad company of all of the street not occupied by the railway company, the attempted grant was void as amounting to a grant of the entire street.

I am unable to concur in either of these contentions.

I have already stated my conclusion that the grant to the railway company is void, and that the ordinance of August 6, 1883, to the railroad company does not authorize the construction and operation of the west track of said railroad company. I cannot escape the conclusion that this track was originally laid (nearly twenty years ago) without authority of law. If Paragraph 13, Section 1 of the ordinance of October 23, 1893, is to be construed as a grant to the railroad company of all that part of the street not belonging to the railway company, I should not hesitate to declare said ordinance void, but it is also susceptible of being interpreted as a ratification of the railroad company's existing tracks and a grant only of the right to occupy that portion of said street and as the reservation of the other portion of the street for the use of the public. Even in this view of the ordinance I should consider it wholly insufficient authority for the maintenance of said track "A"- "B" but for the decisions of the Supreme Court of Illinois (notably *City v. U. S. Y. & T. Co.*, 164 Ill. 224), making the doctrine of estoppel applicable to municipalities, even where the question is whether or not a railroad has taken public land for railroad use without lawful authority. Notwithstanding this line of cases, I can never assent to the doctrine that any title to stolen goods can arise

from the acquiescence of public officers in the long continued retention of the loot.

In view of the total absence of any judicial determination of the rights of the railroad company upon the parts of the street in question, and in view of my duty to construe all claims strictly in favor of the public and against private interests, I am unwilling to apply the doctrine of estoppel to the city in this case in advance of judicial determination. At the same time, the case is so doubtful that I do not believe myself justified in advising the executive officers of the city to refuse to permit the continued use and operation of the track in question.

I believe the only safe course to pursue in this instance is to submit a copy of this opinion to the City Council and to obtain from that body authority for the institution of legal proceedings by the city which shall determine the conflicting rights of the city and the railroad company under the ordinances referred to above. In the meantime, since the tracks must be permitted to be maintained and operated pending a judicial determination of the questions, it seems to me to be the unquestioned duty of your department to permit them to be so maintained as to eliminate the danger of loss of life and destruction of property, provided this can be done without prejudice to the rights of the city.

Counsel for the railroad company have agreed to file a stipulation that any permits which may be issued shall be without prejudice to the respective rights of the city and the railroad company, and without prejudice to any of the matters herein in controversy, and to stipulate and agree to take up whatever tracks are reconstructed or repaired under such permits whenever a final decision is reached in the courts settling the rights of the party adversely to them.

It has been clearly demonstrated by the representatives of the railroad company that mere patchwork repairs on this track do not afford the necessary security to persons and property transported over this track, and that the tracks need a thorough reconstruction.

I am of the opinion that you should issue permits to the Chicago & Western Indiana Railroad Company to repair,

and if, in your opinion, necessary, entirely reconstruct the track "A"- "B" and the cross-over "B"- "C" shown on the plan referred to above.

Since, however, that part of the track "A"- "B" which extends southward from "B" to 14th street, hereinbefore referred to as the "stub track" was constructed after the passage of the ordinance of October 23, 1893, above referred to, and cannot therefore be considered as an existing construction ratified by said ordinance, I do not believe that the doctrine of estoppel applies, and I am of the opinion that you should not permit such portion of said track to be repaired or to be used.

The switch on said track "A" which would permit the use of said extension, was by agreement with the railroad company so spiked that said extension cannot be used and is not in use. This situation I believe should be maintained by the city during the pendency and until the determination of the legal proceedings which I have referred to, for the ascertainment of the respective rights of the railroad company and the city.

It is perhaps material to note that litigation is already pending between the city and said railway company instituted by my predecessor by authority of the City Council, under which authority I intend to file an additional suit for the determination of *all* existing controversies between the city and said railway company.

In all permits which you may hereafter issue for the repair or reconstruction of the track "A"- "B" and the switches and cross-overs to the east track aforesaid should contain the following clause:

"This permission and authority is given by the city and accepted by said railroad company, upon the express understanding and agreement that it is without prejudice to the rights of said city and said railroad company, respectively, and to be without effect upon the disputed and conflicting rights and claims of said city and said railroad company, and that said railroad company agrees to take up and remove from said street such portion of said construction as may here-

after be judicially determined to be without lawful right and authority."

Herewith find enclosed correspondence and papers submitted by you to this department.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

MARCH 31, 1905.

MR. GEORGE WILLIAMS, Building Commissioner.

Dear Sir:

I have your communication of the 30th inst., stating that a few days ago, in answer to your request for an interpretation of Section 1099 of the new building ordinance in regard to the location and maintenance of inside standpipes in buildings, I informed you it was the duty of the Fire Marshal to have them installed and to see that they were maintained in proper condition, and that the building department had nothing whatever to do with them. You now ask my written opinion so as to prevent any future controversy.

In reply I beg leave to advise you that at the time I received your letter I was in conference with the Fire Marshal on the subject. I told him that the ordinance required his department to take complete charge of this matter, and upon the receipt of your letter, I called you into the conference. As the result of the said conference the Fire Department has, under my interpretation of said Section 1099 of the new building ordinance, assumed complete control of the enforcement of said ordinance. I adhere to the verbal opinion I gave you.

Yours very truly,

WM. H. SEXTON, -

First Assistant Corporation Counsel.

MARCH 31, 1905.

TO THE HONORABLE, THE COMMITTEE ON JUDICIARY, OF THE
CITY COUNCIL.

Gentlemen:

I have the honor to advise you that I have had under consideration, your request for a draft of an ordinance re-

stricting the number of news stands permitted at any street corner, to one stand, or four at each street intersection, and in my opinion, such an ordinance would not be valid for the reason that it would impliedly at least, authorize the placing of four stands at each intersection.

Section 1839 of the Revised Code of Chicago of 1897, provides as follows:

“No person shall erect any booth or establish or fix any stand for the sale of fruit, books or other merchandise, or any article or thing of value whatever, incumbering any part or portion of the streets or sidewalks under the penalty of not more than five (\$5.00) dollars for each offense.”

Since therefore, the establishment of booths or stands for the sale of other species of merchandise on sidewalks is prohibited, an ordinance permitting the establishment of stands for the sale of newspapers on sidewalks would be, in my opinion, invalid, because this would be an unjust discrimination in favor of a particular business.

I am moreover of the opinion, in view of recent decisions of our Supreme Court, that the City Council would have no power to authorize or permit the establishment of stands or booths for the sale of any kind of merchandise on any part of a public street or sidewalk.

Respectfully yours,

WILLIAM ROTHMANN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

APRIL 3, 1905.

MR. JOHN W. ECKHART, President, Board of Directors of the
Chicago Public Library.

Dear Sir:

I have your letter of recent date, requesting our opinion as to the power of your board to invest money bequeathed to it by Hiram Kelly, deceased, in real estate.

In his last will and testament Hiram Kelly bequeathed to his wife, her heirs and assigns forever, one-half of all his

estate, both real and personal. The remaining one-half, both real and personal, he bequeathed to trustees upon certain trusts. The will directs the trustees to sell and convert into money so much of the same as may be necessary to pay the specific legacies mentioned in Section 1 of Article III of the will, and to pay such legacies out of the proceeds of the sales. Section 2, Article III of the will then directs that after payment of the specific legacies enumerated therein, the trustees shall retain and hold the residue of the said one-half of the estate during the lifetime of the wife, and directs that the trustees pay to her the income from such residue in quarterly payments during her life for her sole use and benefit.

Section 3, Article III of the will directs that upon the death of the wife all the residue of said one-half of the estate, either realty or personalty, be sold and converted into money by the trustees, and that out of the proceeds of such sales certain payments be made. One of the payments directed is:

“To the Board of Directors of the Chicago Public Library, the income therefrom to be used by them in such manner as they may deem best for the benefit of such library, the sum of \$20,000.”

Section 4, Article III of the will provides if any surplus shall remain after payment of the specific legacies mentioned in Article III thereof:

“That the whole of such surplus shall be paid to the Board of Directors of the Chicago Public Library, the income thereof to be used by them in such manner as they may deem best for the benefit of such library.”

Section 5, Article III of the will provides that all the specific bequests mentioned in Section 3, Article III:

“Are made upon the express condition that the principal sum so given to each of said bodies, societies and organizations, shall forever remain intact and be by such body, society or organization invested in such manner as in its judgment will produce the best income, due regard being had to the safety and security of such investment and that only the income or revenue of such principal sum so invested shall be used by such body, society or organization, in such manner

as in its judgment will best promote its benefit and further the purposes of its organizations."

Article IV appoints executors; Article V appoints trustees.

I understand that the wife of Hiram Kelly died; that the property held by the trustees for her use during her lifetime was sold; that the sum of \$20,000 was paid to the Directors of the Chicago Public Library as provided in Section 3 of Article III.

I also understand that after the payment of the specific legacies mentioned in Section 3 of Article III of the will, a surplus remains. Section 4 of Article III of the will provides that any surplus thus remaining shall be paid to the Board of Directors of the Chicago Public Library.

I understand that the estate owns the property upon which the Brother Jonathan building stands; that it was advertised for sale by the trustees with the reserved right to reject bids, and that the bid on this specific piece of property was rejected by the trustees for the reason it was too low.

You state in your letter that your Board of Directors desire to buy the property, and that the bidder, whose bid was rejected, claims that your board has no right to invest the legacy in real estate, and you request our opinion as to your authority to buy this piece of property with the money bequeathed to your board by Hiram Kelly.

The Chicago Public Library was organized under an act to authorize cities, etc., to establish and maintain free public libraries and reading rooms. Approved and in force March 4, 1872 (page 1181, Hurd's R. S., 1903).

Section 5 of this act prescribes the powers of the directors. The only authority given for the purchase of real estate is:

"Said board shall have power to purchase or lease grounds to occupy, lease or erect an appropriate building or buildings for the use of said library . . ."

Your board has, therefore, no power to purchase real estate other than that required for the immediate use of the library itself.

Section 5 of the act also provides that:

"All moneys received for such library shall be deposited in the treasury of said city to the credit of the library fund, and shall be kept separate and apart from other moneys of said city and drawn upon by the proper officers of said city, upon the properly authenticated vouchers of the library board."

Section 9 of the act, however, excepts from the foregoing provision, money donated to the library.

Section 9 is as follows:

"Any person desiring to make donations of money, personal property or real estate for the benefit of such library, shall have the right to vest the title to the money or real estate so donated in the Board of Directors created under this act, to be held and controlled by such board, when accepted, according to the terms of the deed, gift, devise or bequest of such property; and as to such property the said board shall be held and considered to be special trustees."

In this case the testator directed the sale of his property, both real and personal, and the payment of the proceeds of such sale, after the payment of certain specific legacies, to your board.

You now ask whether your board has the authority to convert this money into realty by the purchase of this property. Section 9 of the Library Act provides that your Board of Directors shall hold this donation as special trustees. The general rule of law is that trust funds cannot be converted into real estate. There are, however, decisions holding that where an investment in real estate by the trustee is plainly beneficial, and there are particular circumstances justifying a departure from the general rule, such investment may be made. I understand that in this case the trustee has been unable to obtain a bid of a sufficient price for this property; that if the trustee is compelled to sacrifice the property, your board would lose a large sum of money. While the general rule of law is as I have stated, I am of the opinion that upon the presentation of these facts to a court, the purchase of said property by your board might be authorized. This can be done by the filing of a petition for the construction of the trust and praying a decree, authorizing the investment. The

proposition is not free from doubt, but it would, in my opinion, be eminently proper for your board to adopt that course.

Yours very truly,

WM. H. SEXTON,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

APRIL 7, 1905.

TO THE HONORABLE, THE FINANCE COMMITTEE.

Gentlemen:

I beg leave to acknowledge receipt of your communication of the 14th ult., in reference to the claim of the Metropolitan Contracting Company.

From a reading of the papers attached to your communication, I understand that on June 4, 1901, a judgment of confirmation was entered in the County Court for an assessment levied to defray the cost of constructing certain drains on 103d street; that objections were filed in the County Court for certain property, and that the city, notwithstanding these objections, let the contract for the construction of the drains in front of the property which was objected for, and that said drains were constructed in front of said property. That thereafter the County Court heard evidence, and held that the ordinance requiring the construction of drains in front of the property objected for was unreasonable and sustained said objections, and consequently there is no fund out of which to pay the cost of the construction of these drains.

You ask "whether or not the refusal of the court to confirm judgment would act as a bar to subsequent proceedings to levy an assessment at this time to pay for this work."

In answer to the above inquiry, I beg leave to state that in my opinion no subsequent proceedings will lie whereby an

assessment can be legally spread to cover the cost of the construction of the drains in question.

Respectfully submitted,

ROBERT REDFIELD,

Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

APRIL 7, 1905.

MR. R. B. WILCOX, Secretary,

Board of Inspectors of Steam Boilers and Steam Plants.

Dear Sir:

Answering your letter of March 24th, in which you inquire whether or not you have the power to "shut down the boilers when they are not properly equipped with smoke consuming devices and are not capable of being so managed as to prevent the emission of dense smoke," I beg leave to say:

The ordinances to which your letter refers have been superseded by the revision prepared in this office and recently adopted by the City Council, but not yet in print, and I therefore quote briefly from the Revised Code on this subject. Section 2213 of the new code reads as follows:

"The emission of dense smoke . . . from any chimney or smokestack of any building or premises, in the city shall be deemed and is hereby declared to be a nuisance, and such nuisance may be summarily abated by the chief smoke inspector or any person duly authorized by him for that purpose. The remedy herein provided for by abatement shall be cumulative to the remedy hereinafter provided for by prosecution and fine."

The reading of this new ordinance leaves very little to be discussed, and I shall only briefly refer to the law with regard to the abatement of nuisances.

Aside from this ordinance, the evil against which it is directed unquestionably constitutes a public nuisance at common law. (*Secord v. People*, 121 Ill. 623.)

Moreover, the action of the City Council in thus defining and declaring the nuisance is also unquestionably sup-

ported by the authorities. (*Am. & Eng. Ency. of Law*, 2d Ed., Vol. 21, page 740; *Laugel v. City of Bushnell*, 177 Ill. 26; *Harmison v. Lewiston*, 153 Ill. 313; *Harmon v. City of Chicago*, 110 Ill. 400; *Marshall Field v. City of Chicago*, 44 Ill. App. 410; *Pennsylvania Company v. City of Chicago*, 107 Ill. App. 38; *Cincinnati v. Miller*, 11 Ohio Dec. (Reprint), 788 (29 Law Bulletin, Cincinnati, page 364); *People v. Detroit White Lead Works*, 82 Mich. 472; *People v. Lewis*, 86 Mich. 276; *Gilfillan v. St. Paul*, 36 Minn. 298; *Moses v. U. S.*, 16 App. Cas. D. C. 428; *Bradley v. District of Columbia*, 20 App. D. C. 969

Since, therefore, the emission of dense smoke is a public nuisance both at common law and under this ordinance, it is in order next to consider what the power of the municipality is to abate a nuisance.

Mr. Justice Sheldon, in the case of *King v. Davenport*, 98 Ill. 305, has discussed this question with regard to the power of the municipality to enforce summarily compliance with its ordinances prohibiting the erection of frame buildings within certain limits, by abatement; that is to say, by the tearing down of the building. I quote from his decision:

"As the summary abatement of nuisances is a remedy which has ever existed in the law, its exercise cannot be regarded as in conflict with constitutional provisions for the protection of the rights of private property. Blackstone, in his classification of remedies by the act of a party, says, 'the fourth species of remedy by the mere act of the party injured, is the abatement or removal of nuisances,' 3 Black. Com. 5,—and that 'the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy, such things as are of daily convenience for use, require an immediate remedy, and cannot wait the slow progress of the ordinary forms of justice.'"

In support of the proposition that a municipality may use its police power in a summary way, without recourse to the courts, for the abatement of a nuisance, Mr. Justice Sheldon quotes numerous cases, those most appropriate to the question under discussion being as follows: *Hart v. Mayor*,

etc., of *Albany*, 9 Wend. 571; *Baker v. Boston*, 12 Pick. 193; *Wadleigh v. Gilman*, 3 Fairfield, 403; *Blair v. Forehand*, 100 Mass. 136; *Morey v. Brown*, 42 N. H. 373.

In justifying the right of the municipality to use force for the abatement of the nuisance, and to act summarily, without resort to the protracted course of litigation, Judge Sheldon said:

“Every moment’s delay in the removal of the nuisance is constant exposure to danger. Before any judicial inquiry and hearing could be had in the matter, the whole evil sought to be guarded against might be produced.” (Page 315.)

In answer to the argument of counsel, as appears from an examination of their briefs, that the fixing of a penalty to be imposed by prosecution and fine was an indication of legislative intent that that alone should be the remedy used, Judge Sheldon said:

“The imposition of a penalty would but punish the offender, it would not remove the source of danger. This latter is the thing which the necessity of the case requires, and immediate abatement is the only competent remedy.”

The doctrine of Mr. Justice Sheldon in *King v. Davenport*, *supra*, was adopted and approved in 1893 by Mr. Justice Boggs (now a member of the Supreme Court of Illinois, but then serving with distinction as Presiding Justice of the Appellate Court for the Third District of Illinois) in *Nazeworthy v. City of Sullivan*, 55 Ill. App., page 48.

Paragraph 75 of Section 1 of Article 5 of Ch. 24, R. S. Ill., expressly gives power “to declare what shall be a nuisance and to abate the same and to impose fines upon parties who may create, continue or suffer nuisances to exist.” This statute delegates to municipalities power to pass the ordinance in question, and in the exercise of that delegated legislative power the City Council of the City of Chicago has acted. This ordinance, therefore, has all the force, effect and dignity of a State statute. Upon this point Judge Sheldon, in the case above referred to, says:

“Such an ordinance, enacted in pursuance of legislative

authority, has the force of a statute, and may be viewed as though such, in the treatment of the present subject."

This principle greatly fortifies the position of the city and makes it possible to cite in support of its power that long list of authorities sustaining similar acts of State legislative bodies. In short, for the purposes now under consideration, the municipality is but an agency of the supreme legislative power, and its acts in this respect are the acts of the supreme legislative authority.

Thus viewed, there can be no doubt of the power of the city since the passage of the revised code to take whatever steps may be necessary for the abatement of smoke nuisance. The remedy by prosecution and fine has accomplished much, but it has been found wanting in promptness and therefore in efficiency. Since the power of municipalities to abate nuisances has been sustained even to the extent of tearing down buildings and removing them from places where the building itself was a nuisance, I cannot doubt that the city in this instance has the right to do whatever may be necessary in order to prevent the emission of dense smoke, and if it can be prevented in no other efficient way, that the city authorities may draw the fires from under the boilers where dense smoke is being emitted and may prevent the operation of such boilers until they have been provided with efficient smoke preventing devices.

The responsibility for the abatement of nuisances is by ordinance particularly cast upon the chief smoke inspector. A similar duty is by other sections of the revised code vested in the Commissioner of Health for the abatement of nuisances generally. I think, however, that the duty in the first instance is upon the smoke inspector, because it is cast upon him by specific language in the ordinances with regard to the prevention of smoke. It will be noted that this ordinance does not present the case of the delegation of legislative authority to either of these officers, for the ordinance is complete in its terms, defines what shall constitute a nuisance, and merely directs the ministerial and executive officers named to abate the nuisances which the legislative department has de-

fined and declared. This distinction is well stated by Mr. Justice Wilkin in *Arms v. Ayer*, 192 Ill. 601 (610).

I would suggest that the remedy by abatement be employed by you in a manner harmonious with the provisions of the ordinance which govern the remedy by prosecution and fine; that is to say, before boilers are shut down or the fires drawn from under them, notice should be given to some responsible person in charge, and that this powerful and unusual remedy, while it should be employed with firmness, promptness and uniformity in all proper cases, is not an appropriate remedy in the case of the commission of a first offense.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

APRIL 7, 1905.

HON. CARTER H. HARRISON, Mayor.

Dear Sir:

Answering your verbal inquiry as to whether or not Richard J. Moore can lawfully be restored to his former position of Lieutenant of Police, I beg leave to say:

From the correspondence submitted to me and from personal investigation I ascertain that the facts in the case are as follows:

On March 6, 1905, by "General Order No. 21", Lieutenant Richard J. Moore was "discharged from the force for superannuation, . . . being eligible to retirement on pension."

The language above quoted was taken from said order, which was signed by Francis O'Neill, General Superintendent of Police.

Lieutenant Moore at the date last aforesaid had served more than twenty years on the regular force and had reached the age of fifty years, and was therefore eligible to a pension under the provisions of Section 3 of the Police Pension Fund Act (R. S. Ill., Hurd's Ed., Ch. 24, Sec. 393).

Lieutenant Moore was not a civil service appointee. He was what is known as a "holdover", having been a member

of the police force prior to the passage of the Civil Service Act.

On March 23, 1905, the Superintendent of Police addressed a letter to the President of the Civil Service Commission, in which he said:

"There is a vacancy for Lieutenant at present in this department which I would like to fill by restoration to duty of Police Pensioner Richard J. Moore."

The communication above referred to goes on to state that the discharge of Lieutenant Moore was not for misconduct or violation of rules, but "for the purpose of retiring him from active service;" and concludes: "I therefore request permission to restore Lieutenant Richard J. Moore to active duty."

There are two classes of pensioners, one class being those who have incurred physical disability "while in and in consequence of the performance of duty," the other being those who have served more than twenty years on the regular police force and have reached the age of fifty years. This department has heretofore discussed the status of these two classes of pensioners, and it has been held that the disability pensioners are merely retired from active service but still remain members of the force. The superannuated pensioner, however, cannot become a pensioner until his connection with the force has terminated. This is a condition precedent to his becoming a pensioner.

Since Richard J. Moore was a "holdover" the Civil Service Commission have no jurisdiction over him. They have neither the right to consent that he be reinstated nor to refuse that right if it exists. The application of the Superintendent of Police to the Civil Service Commission was entirely unnecessary, and the observations of that body with regard to the matter must be regarded only as an expression of their view and in no way partake of the nature of official action. The Civil Service Commission in their answer to the letter of March 23d above referred to recognize this fact in part, and say:

"As the said Moore was a holdover lieutenant the commission had no jurisdiction over his discharge, and he hav-

ing been discharged by the head of his department and said discharge having been reported to this commission, he certainly has ceased to have any rights as an employe in the classified service, and the only way possible for him to re-enter the service is in accordance with the rules of the Civil Service Commission and after examination."

I agree with the views expressed by the commission with regard to their disclaimer of jurisdiction over Mr. Moore's discharge, but cannot agree with them in the subsequent propositions which they advance. Instead of ceasing to have any rights as an employe in the classified service, the fact is he never had any such rights nor ever was an employe in the classified service; nor do I agree with the proposition that the only way *possible* for him to re-enter the service is under the rules of the Civil Service Commission and after examination. This is in accordance with the general rule, but overlooks an exception to that rule, and is therefore too broad a statement. I believe that if the Superintendent of Police discharges a "holdover" for the purpose of retiring him and placing him on the list of superannuated pensioners, and should ascertain that he made a mistake in some material question of facts; as, for example, should ascertain that he had not served twenty years or had not reached the age of fifty, if he acted with due dispatch after the discovery of this error, he might correct it by revoking and rescinding the action which he thus took under a misapprehension of the facts; or if he were induced to take his action by false and fraudulent misrepresentation of facts, I have no doubt that he could relieve himself from the consequence of the fraud thus practiced upon him, by promptly revoking his action, and that in such case the pensioner would be restored to his former state as a "holdover", would still be without the jurisdiction of the Civil Service Commission and would not be obliged to obtain his position through a new and original application and examination.

It will be observed, however, that in this case there is no possible suggestion of fraud or mistake. It still appears that Lieutenant Moore did serve twenty years and was more than fifty years of age, and that it was the intent of the Super-

intendent of Police to place him upon the list of superannuated pensioners; that what he did was done understandingly, with full knowledge of its consequences.

In the absence, therefore, of the existence of any facts tending to give the right to the Superintendent of Police to rescind his action for fraud, mistake or other valid cause, I believe Lieutenant Moore cannot be lawfully restored to his position.

Very respectfully,

EDGAR B. TOLMAN,
Corporation Counsel.

APRIL 8, 1905.

MR. E. M. LAHIFF, City Collector.

Dear Sir:

Your communication to the Corporation Counsel enclosing communication from H. B. Riley, of the Chicago Title & Trust Co., regarding the charge of interest on flat installments, has been referred to me. You request advice as to what course you should pursue in the matter. I beg leave to state that in my opinion since the decision in the case of *McChesney v. City of Chicago*, 213 Ill. 562, interest is not collectible on assessments payable in one installment. I therefore would advise you that on all such assessments not to collect interest. I may further suggest, however, that there is now pending in the Illinois legislature a bill to amend the law so that interest may be collected on all assessments whether installment assessments or flat assessments.

Respectfully submitted,

ROBERT REDFIELD,
Attorney Board of Local Improvements.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

APRIL 10, 1905.

HON. CARTER H. HARRISON, Mayor of Chicago.

Dear Sir:

You have referred to this department for an opinion, several communications from Mr. Arthur Burrage Farwell,

Secretary of the Hyde Park Protective Association, concerning the saloon license of Edward S. Mandernach, No. 6800 Cottage Grove avenue, which Mr. Farwell urges you to revoke upon the following grounds:

First. That Mr. Mandernach pleaded guilty in the Criminal Court of Cook County to a charge of keeping his saloon open on election day, April 5, 1905, and

Second. On the ground that the saloon has its main entrance diagonally across the corner of 68th street and Cottage Grove avenue, and that, therefore, the consent of a majority of the bona fide householders and persons or firms living in or doing business on each side of Cottage Grove avenue, between 68th and 69th streets, and on each side of 68th street, between Cottage Grove and Evans avenues, should have been procured.

As to the first proposition, the fact that Mandernach pleaded guilty of a violation of the laws and ordinances regulating the keeping of a saloon, if such be the fact, would warrant your revocation of his license if you see fit to do so in your discretion; there is no law requiring you to do so.

As to the second proposition, the ordinance of the Village of Hyde Park governing the saloon business is published at Section 2085 of the Revised Code of Chicago of 1897, and reads as follows:

“Any person who shall desire to obtain a license to keep a saloon or dram shop shall, in addition to the requirements now provided by ordinance, present his application in writing to the Village Comptroller for such license, in which shall be stated the name of the person or firm to whom the license is to be issued and the place where such saloon or dram shop is to be kept, which application shall be signed by a majority of the property owners, according to frontage on both sides of the street in the block upon which such dram shop is to be kept, and shall also be signed by a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which such dram-shop shall have its main entrance; Provided, however, that any person or firm who shall have made application as aforesaid, and received a license to keep a dram shop shall not be

required to present an application as above in order to obtain a renewal of the license to himself or firm unless at least one-quarter ($\frac{1}{4}$) of the property owners or bona fide householders, persons and firms doing business upon both sides of the street in the block upon which the said dram shop has its main entrance, shall file with the Village Comptroller, at least thirty days (30) prior to the time for the renewal of such license, a notice stating that the signers thereof object to the granting or renewing of the license to said person or firm. Upon receiving such notice the Village Comptroller shall notify the captain of police that such notice has been filed, and the captain of police shall at once notify or cause to be notified the holder or holders of the license. But a failure to give such notification shall not be construed as a waiver of the necessity for filing the application as provided above."

It will be observed that in addition to the frontage consents required the ordinance requires that the consent must be obtained of:

"A majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which such dram shop shall have its main entrance."

It is claimed that because this saloon has its main entrance diagonally across the corner, therefore, such main entrance is located on two blocks; in other words that it is as much on 68th street as it is on Cottage Grove avenue.

The decisions of the courts and previous opinions rendered by this department, in my opinion, sustain this contention.

An inspection of the original petition submitted by Mandernach discloses the fact that it does not contain the signature of any householder, person or firm living in or doing business on 68th street, between Cottage Grove avenue and Evans avenue.

Our investigator reports that there are three householders living on 68th street, between Evans and Cottage Grove avenues, who were living there at and prior to the time of issuing this license. The consent of a majority of these persons should, in my opinion, have been obtained to the issu-

ance of the license. For this reason the petition of Mr. Mandernach was and is insufficient, and he is now conducting a saloon without proper authority.

I transmit herewith the saloon license petition; the application for license; the accompanying plat and all correspondence relating to the matter.

Yours very truly,

WM. H. SEXTON,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

APRIL 10, 1905.

MR. EDWARD M. LAHIFF, City Collector.

Dear Sir:

The Mayor has referred to this office communications from the Hyde Park Protective Association to himself, dated March 31, 1905, transmitting protests against the renewal of saloon licenses to P. J. O'Hare, No. 963 51st street; Charles Blomberg, No. 10101 Ewing avenue, and George Willey, No. 10550 Ewing avenue, all located in that part of the City of Chicago which was formerly the Village of Hyde Park, and requested that your department be advised as to the legal status of these matters.

The license of George Willey has been revoked. Each of the other persons named now has a license to conduct a saloon at the place mentioned and under the ordinance of the Village of Hyde Park relating to dram shops would be entitled to a renewal of such license without presenting a new petition, unless protested against by the necessary number of property owners, or of householders, persons and firms doing business in the block upon which such saloon has its main entrance. This is on the assumption that each of said persons now has a valid saloon license petition; whether the several petitions on which the present licenses were based are valid or not, it is not necessary for the present purpose here to consider.

The object for which these protests are filed is not to

procure the revocation of the present licenses, but to prevent their renewal at the expiration of the present license period; namely, on April 30, 1905.

The ordinance of the Village of Hyde Park in question is published at Section 2085 of the Revised Code of Chicago of 1897.

It will be noted that under the provisions of said ordinance a saloonkeeper once having a license under a valid petition containing the requisite amount of frontage consents, may have his license renewed every year without presenting a new petition, unless such renewal is protested against by the owners of one-quarter ($\frac{1}{4}$) of the property or by one-quarter ($\frac{1}{4}$) of the bona fide householders, persons and firms doing business on both sides of the street in the block upon which the said dram shop or saloon has its main entrance.

The renewal of the license of P. J. O'Hare is protested against by Kate T. Peek and Helen T. Cheney, each of whom claims to own 81 feet of frontage on 51st street, between Indiana avenue and Prairie avenue, that being the block in which the saloon of said O'Hare is located. The 162 feet in question, it is claimed, amounts to more than one-fourth ($\frac{1}{4}$) of the frontage on 51st street, between Indiana and Prairie avenues, and if this is true, it will be necessary for O'Hare to present a new petition, containing the signatures of the owners of a majority of the frontage on both sides of the street on all four sides of the block in which the saloon is located, before a new license can be issued to him. Mr. Farwell states that he will furnish you the certificates of survey showing that the 162 feet in question are more than one-fourth ($\frac{1}{4}$) of the frontage.

In the case of Charles Blomberg, No. 10101 Ewing avenue, a protest is presented signed by persons claiming to own 335.35 feet of frontage, which is said to constitute more than one-fourth ($\frac{1}{4}$) of the frontage on Ewing avenue, between 101st and 102d streets. If so, then the protest would prevent the renewal of Blomberg's license, unless a new frontage consent petition is presented; otherwise not. In accordance

with the provisions of the ordinance quoted, the police department should be directed to notify the two parties named, that these protests have been filed.

Protests and communications are returned herewith.

Yours very truly,

WILLIAM ROTHMANN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

APRIL 10, 1905.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

I am in receipt of communication from you of recent date, requesting the opinion of this department as to what course you should take with reference to moving the columns of the structure of the Lake Street Elevated Railroad Company on Lake street, between Talman and Homan avenues, in this city.

You attach to your communication some correspondence from Mr. Clarence A. Knight, President of the company, in which he demurs to your request to submit plans showing the changes necessitated by reason of the widening and improving of Lake street at this point, and calls attention to the fact that this department has held that when construction is once completed, the power to make additional and different construction is exhausted. It is true, as the president of the company states, such is the contention of this department, but such an interpretation of your request is entirely foreign and irrelevant to the subject matter thereof. This company is not now attempting to make changes in its structure under any supposed power so to do given in the ordinance granting it track rights, but, on the contrary, is being requested to perform obligations imposed upon it by sections of various ordinances accepted by it. The ordinance under which this company constructed its road and is operating the same contained clauses which provide:

"The City of Chicago reserves the right, at any time whenever it may deem it necessary, to change the grade of

any street or alley over which the said structure may pass, without incurring any liability on the part of the city to said company, its successors or assigns, owning or operating said line, and upon notice to the Commissioner of Public Works, the said company, its successors or assigns, shall change its structure over any street where the grade has been actually changed to conform to an ordinance in such manner that the distance and heights provided in this ordinance shall be maintained, and such change of structure shall be without any expense to the city."

This corporation from its inception has been in defiance of the ordinance regulations agreed to by it by written acceptance. It is now in default to the city in the sum of many thousands of dollars for unpaid car license fees, for the recovery of which the city has been compelled to bring an action in court.

In a communication to you from this office of the date of April 6th, it was suggested that a permit requested by this company be withheld until the company removed its station piers at California avenue and Lake street. In harmony with this suggestion, I would make the further suggestion that should this company fail to submit the plans requested by you and perform the work demanded by the city, that its recalcitrant attitude be met by the removal by the city of certain obstructions in the down-town streets occupied by the "Union Loop", in the nature of platform extensions which are not authorized by any ordinance and the permission for the maintenance whereof was refused by you at the direction of this department whose opinion in that regard was sustained by Judge Tuley.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

APRIL 10, 1905.

W. A. LEVERING, Esq.,

Superintendent, Water Pipe Extension Department.

Dear Sir:

We acknowledge receipt of your letter enclosing bills of the Chicago Suburban Water & Light Company for hydrant rentals for the first quarter of the year 1905, and a bill for the repairing of water mains which this company claims were broken by the settling of a city main in Austin avenue.

There is no litigation pending between this company and the city that will interfere with the payment of any of these bills, but in certain litigation pending between the company and the city, wherein the company seeks to enjoin the city from laying water mains in Austin, it has been developed that the fire pressure upon hydrants of this company in Austin is utterly inadequate, and we believe that we can defeat any suit brought to recover upon these bills. At a fire in Austin a few weeks ago it was impossible to get a stream from the company's hydrants that would reach the ceiling of a one-story building. This is not the service that the company contracted to furnish, and what it does furnish is worthless. For that reason we think hydrant bills should be rejected.

As to the bill for repairs upon water mains we are not in a position to give an opinion now as we are not well enough acquainted with the facts. It seems to us, however, that the bills are somewhat peculiar, inasmuch as a charge is made for the time of the superintendent of the hydraulic department, which was not necessary, and the item is an extravagant one.

Herewith we return all bills and correspondence attached to your letter.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

APRIL 10, 1905.

MR. L. E. GOSSELIN, Auditor and Deputy Comptroller.

Dear Sir:

We are in receipt of your letter, enclosing a notice from Kerr & Kerr in reference to water pipe extension certificates numbers 79 and 182, in which they request you to refuse payment of these certificates if they are presented.

It seems from this notice that these certificates were issued in 1890 and 1891 to Doctor S. Place, that afterwards he assigned them to Doctor S. Place, Samuel Kerr, Frank A. Henshaw, George F. Stodder and William B. Kerr, as Trustees of the Chicago Auburn Park Land Trust, or to the "Trustees of the Chicago Auburn Park Land Trust"; that upon the death of Doctor Place in 1897, Harry W. Christian was appointed trustee in his stead; that the certificates were delivered to Christian for a temporary purpose and that he has refused to return them; that the four living trustees above named have filed their bill in chancery to compel him to deliver the certificates to Samuel Kerr for the trustees of said land trust; that in such suit a decree was rendered directing him to surrender the certificates to the trustees.

Inasmuch as these particular certificates are not negotiable paper, this notice is sufficient, and it becomes your duty to refrain from paying any money upon them to the said Christian until said decree is set aside or the trustees of said land trust request you to make payment.

Herewith we return the notice that accompanies your letter.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Assistant Corporation Counsel.

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